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Yoke Ngoke Seong & Anor v Seou Lim Khoon & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-391–07 OF 2019
B DARRYL GOON J
25 JUNE 2020

Contract — Agreement — Sale and purchase of shares — Parties entered into
C *agreement for sale and purchase of shares ('SSPA') — Plaintiffs failed to pay within stipulated time — Parties entered into supplemental agreement ('SSA') for extension of time to make payment — Defendants terminated SSPA due to plaintiffs' failure to pay within stipulated time pursuant to SSPA and SSA — Winding up petition was served against defendants' company prior to SSPA*
D *— Whether defendants fraudulently withheld information of winding up petition — Whether SSPA was illegal or frustrated – Whether there was total failure of consideration — Whether there was valid agreement to extend time — Whether termination of SSPA and SSA was valid — Whether there was unjust enrichment — Whether defendants' claim for balance of purchase price was proven*
E *— Companies Act 2016 s 472 — Contracts Act 1950 s 57*

The plaintiffs vide a share sale and purchase agreement ('the SSPA') had agreed to purchase the defendants' shares in Advanced Medical Products Sdn Bhd ('AMP'). The defendants in the present case were the shareholders and directors
F of AMP, a company involved in the business of manufacturing, packing and marketing of latex gloves. It ought to be noted that the plaintiffs were represented by one Ricky Chong in the negotiation for the sale and purchase of shares in AMP. After the payment of the initial deposits of RM300,000, the plaintiffs had failed to make the remaining payments within the stipulated time
G as required under the SSPA. Consequently, vide a supplemental agreement ('the SA') which was later stamped ('the SSA'), the parties agreed for an extension of time but again, upon the expiry of the extended period, the plaintiffs failed to settle the payments. Due to this failure, the defendants had terminated the contract. In the present case, the plaintiffs claimed that due to
H intervening events ie winding up of AMP by a company known as May Chemical (M) Sdn Bhd ('May Chemical'), the SSPA had become void by reason of illegality or was frustrated pursuant to s 472 of the Companies Act 2016 ('the CA'). Fraud was also alleged of the defendants for withholding information of the intervening events with total failure of consideration.
I Further, the plaintiffs contended that it was also an implied term in the SSPA that the defendants could not be unjustly enriched by the plaintiffs' investments in the event the SSPA was terminated as the plaintiffs had invested enormous costs and expenses in putting the production lines in operation but did not own the company until the completion of the SSPA. The plaintiffs also

pointed out that pages 3 and 4 of the SSA did not bear the plaintiffs' initials and that those two pages had been fraudulently replaced by the defendants. The defendants denied the plaintiffs' claim and counterclaimed for damages for breach of contract. The defendants submitted that the plaintiffs had breached their payment obligations under the contract and that the defendants had lawfully terminated the contract. The plaintiffs maintained that the termination of contract by the defendants was wrongful because contrary to the defendants' contention, the plaintiffs did not breach any payment obligation as the time to do so had, in the circumstances of the case, became at large and no reasonable notice to pay had been given.

Held, dismissing both the plaintiffs' claim and the defendants' counterclaim:

(1) From the contents of the SSPA, it was as if the defendants were straining every nerve to disclose, 'warts and all' as it were, both financial and other problems of AMP to ensure that the plaintiffs knew of them and had bought the shares in AMP with full knowledge of all of AMP's problems and was willing to accept AMP, 'as is where is'. All these disclosures were not consistent with the suggested inference that May Chemical's winding up petition was known to the defendants, but they chose not to disclose it. Therefore, the court found on a balance of probabilities that the allegation that the defendants had fraudulently withheld informing the plaintiffs of May Chemical's winding up petition or the winding up order, was not proven (see paras 98, 101–102 & 116).

(2) While the transfer of the shares in a company in respect of which a winding up petition had been presented was rendered void unless ordered otherwise by a court, however, s 472 of the CA did not affect the validity of any contract to do so. Therefore, the SSPA, and the SSA if validly entered, was not frustrated by s 472 of the CA as it was still possible to transfer the AMP shares purchased by seeking leave of court. For the above reasons, the plaintiffs' contention that there was a total failure of consideration was also not made out (see paras 129 & 153–154).

(3) The second plaintiff in his witness statement maintained that when he and the first plaintiff received the SSA on 9 April 2019, they were surprised to find that the dates on the SA which they had amended and signed, were not reflected in the SSA. This expression of surprise seemed incongruous with the plaintiffs' lack of response and subsequent delay in responding to the defendants' solicitors' letters. As for the absence of the plaintiffs' initials at the bottom of pages 3 and 4 of the SSA, there was no consistency in initialing the pages of the SSA such that it could safely be concluded, even on a balance of probability, that such absence meant that those pages had been substituted, let alone substituted by the defendants. Accordingly, the SSPA was not proven to be void or invalid as alleged by the plaintiffs (see paras 156–157, 175, 177 & 191).

(4) Based on the SSA, the first RM370,000 was to be paid on 15 March 2019 and the second RM370,000 on 15 April 2019. It was common ground that neither payments were made on those dates specified. There was therefore clearly a breach of the terms of the SSA. Under cl 2(c) of the SSA, these non-payments '... shall automatically be deemed as a breach of contract on the purchasers' part without the need for the vendors to give 14 days' written notice to the purchasers to remedy the breach and the vendors shall be entitled to terminate the SSPA and to forfeit the entire sum of Ringgit Malaysia Three Hundred thousand (RM300,000) already paid by the purchasers to the vendors ...'. Therefore, the termination of the SSPA by the defendants through their solicitors' letter of 16 April 2019 was not a wrongful termination of the SSPA (see paras 192–195).

(5) Under cl 27 of the SSPA and cl 13 of the SSA, it was stated that time was of the essence. In the circumstances of this case, to suggest that the negotiations for the SSA had somehow resulted in a waiver of time being of the essence was to ignore the very purpose of the SSA in the first place. Even if the SSA was not valid for the reasons asserted by the plaintiffs, time under the SSPA was not at large or ceased to become of the essence because of the negotiations entered into by the parties for an extension of time. The plaintiff's breach of cl 3.2(a)(ii) of the SSPA was not waived, and time remained of the essence. Therefore, the plaintiffs' failure to pay within the time stipulated afforded the defendants the right to terminate the SSPA (see paras 218, 220–221 & 226–227).

(6) In the present case, save for the singular initial payment of RM300,000 which was specifically catered for in the SSPA, the defendants received no other benefit at the expense of the plaintiffs. Further, the expenses for repairing and conducting the tests on the four production lines in AMP's factory, even if they were actually incurred by the plaintiffs, were incurred prior to the SSPA. In addition, they were expenses expressly stated in the SSPA for which the plaintiffs, '... shall be solely liable and responsible to pay ...'. Based on the above, the two tests applicable for the term sought to be implied by the plaintiffs as provided in the case of *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal* [2019] 1 MLJ 25 had not been fulfilled by the plaintiffs. The express terms in the SSPA negated the very term the plaintiffs sought to have implied. In the circumstances of the case, the plaintiffs' claim for restitution whether based on an implied term as pleaded or even upon unjust enrichment as an independent cause of action, was untenable and not established (see paras 260, 263–264, 266 & 270).

(7) The defendants' counterclaim was not a viable claim. It was a term of the SSPA under cl 17.2(a) that in terminating the SSPA for breach, the defendants may forfeit RM375,000 as liquidated damages. The defendants had by retaining the RM300,000, in effect, exercised it rights

to liquidated damages as agreed, albeit RM75,000 short of the agreed sum. The winding up of AMP was not a loss suffered by the defendants. There was no evidence of any sale or loss of AMP's assets. Furthermore, the AMP shares to be sold had not been transferred to the plaintiffs and the defendants continue to remain as shareholders of AMP. Accordingly, the defendants' claim for what was effectively the balance of the purchase price under the SSPA was not proven (see paras 277–278 & 280–282).

[Bahasa Malaysia summary

Plaintif-plaintif melalui perjanjian jual beli saham ('SSPA') telah bersetuju untuk membeli saham defendan-defendan dalam Advanced Medical Products Sdn Bhd ('AMP'). Defendan-defendan dalam kes ini adalah pemegang-pemegang saham dan pengarah-pengarah AMP, sebuah syarikat yang terlibat dalam perniagaan pembuatan, pembungkusan dan pemasaran sarung tangan getah. Harus diingat bahawa plaintif-plaintif diwakili oleh seorang individu bernama Ricky Chong dalam rundingan untuk penjualan dan pembelian saham di AMP. Setelah pembayaran deposit awal berjumlah RM300,000, plaintif-plaintif gagal melakukan pembayaran selebihnya dalam jangka waktu yang ditentukan seperti yang dikehendaki di bawah SSPA. Oleh itu, melalui perjanjian tambahan ('SA') yang kemudian disetem ('SSA'), pihak-pihak bersetuju untuk memanjangkan tempoh masa tetapi sekali lagi, setelah tamatnya tempoh yang diperpanjang, plaintif-plaintif gagal menyelesaikan pembayaran. Disebabkan oleh kegagalan ini, defendan-defendan telah menamatkan kontrak. Dalam kes ini, plaintif-plaintif mendakwa bahawa disebabkan oleh peristiwa yang berlaku iaitu penggulungan AMP oleh syarikat yang dikenali sebagai May Chemical (M) Sdn Bhd ('May Chemical'), SSPA telah dibatalkan kerana tidak sah atau telah dikecewakan berdasarkan s 472 Akta Syarikat 2016 ('AS'). Defendan-defendan juga didakwa menipu kerana menyembunyikan maklumat peristiwa yang berlaku dengan kegagalan pertimbangan yang menyeluruh. Selanjutnya, plaintif-plaintif berhujah bahawa ianya juga merupakan terma tersirat dalam SSPA bahawa defendan-defendan tidak boleh diperkaya secara tidak adil oleh pelaburan plaintif-plaintif sekiranya SSPA ditamatkan kerana plaintif-plaintif telah melaburkan kos dan perbelanjaan yang sangat besar untuk memulakan operasi barisan pengeluaran tetapi tidak memiliki syarikat sehingga selesai SSPA. Plaintif-plaintif juga menyatakan bahawa halaman 3 dan 4 SSA tidak mengandungi inisial plaintif-plaintif dan bahawa kedua-dua halaman tersebut telah diganti secara fraud oleh defendan-defendan. Defendan-defendan menafikan tuntutan plaintif-plaintif dan membuat tuntutan balas bagi ganti rugi kerana pelanggaran kontrak. Defendan-defendan menyatakan bahawa plaintif-plaintif telah melanggar kewajipan pembayaran mereka di bawah kontrak dan bahawa defendan-defendan telah menamatkan kontrak secara sah. Bertentangan dengan hujahan defendan-defendan, plaintif-plaintif berpendapat bahawa penamatan kontrak oleh defendan-defendan adalah salah kerana

A plaintif-plaintif tidak melanggar kewajipan pembayaran kerana masa untuk melakukannya, dalam keadaan kes ini, telah menjadi luas dan tiada notis pembayaran yang wajar telah diberikan.

B **Diputuskan**, menolak tuntutan plaintiff-plaintiff dan tuntutan balas defendan-defendan:

(1) Berdasarkan kepada isi kandungan SSPA, seolah-olah defendan-defendan berusaha keras untuk mendedahkan, termasuk semua kekurangan, masalah kewangan dan lain-lain masalah AMP
C untuk memastikan bahawa plaintif-plaintif mengetahui keseluruhannya dan telah membeli saham di dalam AMP dengan pengetahuan penuh tentang semua masalah AMP dan bersedia menerima AMP, 'as is where is'. Semua pendedahan ini tidak selari dengan inferens yang disarankan bahawa petisyen penggulungan May Chemical diketahui oleh
D defendan-defendan, tetapi mereka memilih untuk tidak mendedahkannya. Oleh itu, mahkamah mendapati di atas imbangan kebarangkalian bahawa dakwaan bahawa defendan-defendan secara fraud menahan daripada memberitahu plaintif-plaintif mengenai petisyen penggulungan May Chemical atau perintah penggulungan,
E tidak dibuktikan (lihat perenggan 98, 101–102 & 116).

(2) Walaupun pemindahan saham dalam sesebuah syarikat di mana petisyen penggulungan telah dikemukakan adalah tidak sah melainkan diperintahkan sebaliknya oleh mahkamah, namun, s 472 AS tidak
F mempengaruhi keesahan kontrak untuk melakukannya. Oleh itu, SSPA dan SSA, jika dimasuki secara sah, tidak terkecewa oleh s 472 AS kerana masih terdapat kemungkinan untuk memindahkan saham AMP yang dibeli dengan memohon kebenaran mahkamah. Atas sebab-sebab di atas, hujahan plaintif-plaintif bahawa terdapat kegagalan keseluruhan
G pertimbangan juga tidak dibuktikan (lihat perenggan 129 & 153–154).

(3) Plaintif kedua dalam pernyataan saksinya menyatakan bahawa ketika dia dan plaintif pertama menerima SSA pada 9 April 2019, mereka terkejut apabila mengetahui tarikh-tarikh di SA yang telah mereka pinda dan ditandatangani, tidak dinyatakan dalam SSA. Ekspresi terkejut ini
H kelihatannya bertentangan dengan kekurangan dan seterusnya kelewatan oleh plaintif-plaintif dalam menjawab surat peguam defendan-defendan. Mengenai ketiadaan inisial plaintif-plaintif di bahagian bawah halaman 3 dan 4 SSA, tidak ada konsistensi dalam menginisialisasi halaman SSA sehingga boleh disimpulkan dengan selamat, malahan di atas imbangan
I kebarangkalian, bahawa ketiadaan inisial tersebut bermaksud bahawa halaman-halaman tersebut telah diganti, apatah lagi oleh defendan-defendan. Oleh itu, SSPA tersebut tidak terbukti terbatal atau tidak sah seperti yang didakwa oleh plaintif-plaintif (lihat perenggan 156–157, 175, 177 & 191).

(4) Berdasarkan SSA, RM370,000 pertama harus dibayar pada 15 Mac 2019 dan RM370,000 kedua pada 15 April 2019. Kedua-dua pihak bersetuju bahawa pembayaran tidak dilakukan pada kedua-dua tarikh tersebut. Oleh itu, jelas terdapat pelanggaran syarat SSA. Di bawah klausa 2(c) SSA, kegagal untuk membayar ini '... shall automatically be deemed as a breach of contract on the purchasers' part without the need for the vendors to give 14 days' written notice to the purchasers to remedy the breach and the vendors shall be entitled to terminate the SSPA and to forfeit the entire sum of Ringgit Malaysia Three Hundred thousand (RM300,000) already paid by the purchasers to the vendors ...'. Oleh itu, penamatan SSPA oleh defendan-defendan melalui surat peguambela mereka pada 16 April 2019 bukanlah penamatan SSPA yang salah (lihat perenggan 192–195).

(5) Di bawah klausa 27 SSPA dan klausa 13 SSA, dinyatakan bahawa masa adalah penting. Dalam keadaan kes ini, dengan mencadangkan bahawa perundingan untuk SSA telah mengakibatkan kepentingan masa diabaikan adalah bertentangan dengan tujuan asal SSA tersebut. Andai kata SSA tidak sah berdasarkan alasan-alasan yang dihujahkan oleh plaintif-plaintif, masa di bawah SSPA tetap juga tidak menjadi luas atau tidak lagi penting disebabkan oleh perundingan yang dimasuki oleh pihak-pihak untuk memperpanjangkan masa. Pelanggaran klausa 3.2(a)(ii) SSPA oleh plaintif-plaintif tidak diabaikan, dan masa masih lagi penting. Oleh itu, kegagalan plaintif-plaintif untuk membayar dalam masa yang ditetapkan memberikan hak kepada defendan-defendan untuk menamatkan SSPA (lihat perenggan 218, 220–221 & 226–227).

(6) Dalam kes ini, kecuali pembayaran awal tunggal sebanyak RM300,000 yang diperuntukkan secara khusus dalam SSPA, defendan-defendan tidak mendapat faedah lain yang ditanggung oleh pihak plaintif-plaintif. Selanjutnya, perbelanjaan untuk membaiki dan menjalankan ujian di empat barisan pengeluaran di kilang AMP, walaupun jika benar ia ditanggung oleh plaintif-plaintif, ianya terakru sebelum SSPA. Di samping itu, perbelanjaan tersebut adalah perbelanjaan yang dinyatakan secara jelas dalam SSPA yang mana plaintif-plaintif, '... shall be solely liable and responsible to pay ...'. Berdasarkan dapatan di atas, dua ujian yang terpakai bagi plantif-plantif membuktikan terma yang tersirat seperti yang diperuntukkan dalam kes *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal* [2019] 1 MLJ 25 gagal dipenuhi oleh plaintif-plaintif. Terma-terma yang tersurat di dalam SSPA menafikan terma tersirat yang ingin dibuktikan oleh plaintif-plaintif. Dalam keadaan kes, tuntutan plaintif-plantif untuk restitusi sama ada berdasarkan terma tersirat yang diplidkan ataupun atas pengkayaan yang tidak adil sebagai kausa tindakan yang bebas, tidak

dapat dipertahankan dan tidak dibuktikan (lihat perenggan 260, 263–264, 266 & 270).

(7) Tuntutan balas defendan-defendan bukanlah tuntutan yang boleh dilaksanakan. Terma SSPA di bawah klausa 17.2(a) menyatakan bahawa dalam menamatkan SSPA atas sebab pelanggaran, defendan-defendan boleh merampas RM375,000 sebagai ganti rugi yang ditetapkan. Dengan mengambil RM300,000, defendan-defendan pada hakikatnya, menggunakan haknya terhadap ganti rugi yang ditetapkan seperti yang dipersetujui, walaupun terdapat kekurangan sebanyak RM75,000 dari jumlah yang dipersetujui. Penggulungan AMP bukanlah kerugian yang dialami oleh defendan-defendan. Tidak ada bukti penjualan atau kehilangan aset AMP. Selanjutnya, saham AMP yang akan dijual belum dipindahkan kepada plaintif-plaintif dan defendan-defendan terus kekal sebagai pemegang saham AMP. Oleh itu, tuntutan defendan-defendan untuk baki harga pembelian di bawah SSPA tidak dibuktikan (lihat perenggan 277–278 & 280–282).]

Cases referred to

Barclay v Messenger (1874) 43 LJ Ch 449 (refd)
Buckland and others v Farmer & Moody (a firm) [1978] 3 All ER 929, CA (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Goh Yew Chew & Anor v Soh Kian Tee [1970] 1 MLJ 138, FC (refd)
Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65; [1999] 1 CLJ 89, CA (refd)
Jordanlane Pty Ltd v Kitching [2008] VSC 426, SC (folld)
Mah Sau Cheong v Tan Eng Chin [2019] MLJU 1348, HC (refd)
NZ New Image Sdn Bhd v Loh Yok Liang [2016] MLJU 1768; [2016] 9 CLJ 474, CA (refd)
Nadaraja s/l Muthu & Ors v Palanisamy a/l Ramasamy [2003] 2 MLJ 523, HC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal [2019] 1 MLJ 25, FC (refd)
Selaman Sdn Bhd & Anor v Pinang Sari Sdn Bhd [2017] 4 MLJ 462, CA (refd)
Sime Hok Sdn Bhd v Soh Poh Sheng [2013] 2 MLJ 149 FC
Theow Say Kow @ Teoh Kiang Seng, Henry & Anor v Teoh Kiang Hong & Ors and another suit [2014] 9 MLJ 32, HC (folld)
Webb v Hughes (1870) LR 10 Eq 281 (refd)
Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699, CA (refd)

Legislation referred to

Civil Law Act 1956 s 15
Companies Act 1965 (repealed by Companies Act 2016) s 223
Companies Act 2016 s 472, 472(1)
Contracts Act 1950 ss 47, 57, 66
Corporations Act 2001 [AU] ss 468, 468(1)
Evidence Act 1950 s 114(g)
Rules of Court 2012 O 24 r 7(1)

AG Kalidas (K Nadarajah & Partners) for the plaintiffs.
HK Ling (Audrey Chong with him) (Ling & Mok) for the defendants.

Darryl Goon J:

[1] This case concerned a contract for the sale and purchase of shares in a locally incorporated company known as Advanced Medical Products Sdn Bhd (Company No 536519-U) which, for ease of reference, shall hereinafter be referred to as 'AMP'.

[2] Due to intervening events, it was a contract that the plaintiffs claimed had become void by reason of illegality or was frustrated and sought consequential monetary compensation. Fraud was also alleged of the defendants for withholding information of the intervening events with total failure of consideration and unjust enrichment invoked as well.

[3] Denying these allegations and mounting a counterclaim for damages for breach of contract, the defendants maintained that the plaintiffs had breached their payment obligations under the contract and that the defendants had lawfully terminated the contract.

[4] In relation to the defendants' alleged termination of the contract, the plaintiffs maintained that it was wrongful because contrary to the defendants' contention, the plaintiffs did not breach any payment obligation as the time to do so had, in the circumstances of the case, become at large and no reasonable notice to pay had been given.

[5] AMP was a company involved in the business of manufacturing, packing and marketing of latex gloves. It was also the registered proprietor of five pieces of freehold industrial land in Mukim Sitiawan, Daerah Manjung, Negeri Perak.

[6] On AMP's lands were a three storey office block, four main industrial buildings and other ancillary buildings with a postal address at Lot 8961 and 8964, Batu 19, Jalan Beruas Ayer Tawar, Perak Darul Ridzuan.

[7] Apart from the pieces of lands it owned, AMP also had a plant and machinery.

[8] Thus, AMP was not without assets.

[9] AMP has a share capital of RM5m made up of 5,000,000 fully paid up ordinary shares.

[10] The entirety of AMP's issued shares is registered in the names of the defendants, in varying proportions. The first defendant holds 3,200,000 shares, the second defendant holds 1,000,000 shares, the third defendant holds 500,000 shares and the fourth defendant holds 300,000 shares.

[11] Apart from being shareholders, the first, second and fourth defendants are also directors of AMP.

[12] AMP as a company had an assortment of problems. It had ceased manufacturing latex gloves and had not been operating for more than six months prior to the contract entered into between the parties.

[13] The most significant of its problems was the fact that it was not in the best of financial health and consequently it had a host of creditors and was also embroiled in litigation. These problems were of common knowledge between the parties and they were made abundantly clear in the terms of the sale and purchase agreement they subsequently entered into.

THE SHARE SALE AND PURCHASE AGREEMENT ('SSPA')

[14] The plaintiffs themselves did not appear to be conversant in corporate matters. The first plaintiff is a hawker selling noodles. The second plaintiff ran a coffee shop but had ceased doing so, stating that business was not good.

[15] The second plaintiff however, had a brother-in-law by the name of Mr Chong Wei Kee. Chong Wei Kee was known to the parties as 'Ricky'. As Chong Wei Kee was also referred to as Ricky in the testimony of the witnesses, he shall hereinafter be referred to as 'Ricky Chong' for the avoidance of any confusion.

[16] Ricky Chong was in his 60s and was himself involved in a glove manufacturing company in Australia some years before and claimed to have managed it. The company was known as VIP Glove Ltd and he had shares in that company as well.

[17] That was in the past. Since then, Ricky Chong had been declared a bankrupt and was still a bankrupt at the time of the trial.

[18] It was Ricky Chong who had introduced the second plaintiff to the idea of investing in a glove business. Hence the purchase of AMP. With his background and relationship with the second plaintiff, Ricky Chong was relied upon by the plaintiffs as their consultant and agent.

[19] It was Ricky Chong who represented and negotiated on behalf of the plaintiffs for the purchase of all the shares in AMP.

[20] Based on the testimony of the second plaintiff, there were also other investors behind the plaintiffs, contributing funds for the intended purchase of AMP's shares.

[21] These investors were said to be businessmen from Australia and Malaysia. They were, however, not party to the contract for the purchase of AMP's shares. This fact, coupled with the plaintiffs' background and the major role that Ricky Chong played in the whole matter, no doubt led the defendants to maintain that the plaintiffs were actually nominees of Ricky Chong.

[22] Prior to the execution of the contract for the purchase of the shares in AMP, the plaintiffs had wanted to test run the nine latex glove production lines in AMP's factory. As indicated, these production lines had not been operating for months.

[23] The plaintiffs were permitted to do so and they, including Ricky Chong and engineers instructed by them, were allowed into AMP's factory to conduct the tests. In so doing, four of the nine production lines had to be repaired and restored.

[24] The tests conducted and repairs carried out on the four production lines were undertaken by the plaintiffs voluntarily, with the consent of the defendants.

[25] Having done so, the plaintiffs and the defendants executed a written contract described as a shares sale and purchase agreement which was expressed to have been made on 26 January 2019 ('SSPA').

[26] At the trial, the SSPA was admitted into evidence by counsel for the parties as what has become commonly known as a Part A document, that is to say, counsel for the parties had agreed that the SSPA be admitted into evidence on the basis that its authenticity and contents are not disputed.

[27] The SSPA was for the purchase by the plaintiffs, described therein collectively as the 'purchasers', of all the shares in AMP from the defendants for a total consideration of RM3.75m.

[28] In respect of the inspection of the production lines and the repairs carried out prior to the SSPA, recital 'L' to the SSPA expressly stated as follows:

> L. Prior to the execution of this Agreement, the Property together with the plant and machinery thereat, the details of the plant and machinery are more particularly set out in the Schedule 6 annexed hereto (hereinafter referred to as 'the plant and Machinery') *have been made available to the Purchaser for inspection at the cost and expense of the Purchasers.* Prior to the execution of this Agreement, *the Purchasers had also at the Purchasers' own costs and expense conducted all the necessary test run of the latex gloves production lines and the Purchaser have satisfied themselves or shall be deemed to have satisfied themselves with the said inspection and test run and have agreed to enter into this transaction to purchase the Sales Shares on an 'as is where is' basis with its current financial condition as per the List of Estimated Creditors of the Company as at 31st August 2018,* subject to any express or implied restrictions of interest or conditions, applicable thereto, upon the terms and conditions hereinafter appearing. *The Purchaser shall not be entitled to rescind this Agreement or to make any claim for compensation or reduction on the Total Purchase Price or claim for any damages in respect of any of the aforesaid matters* or of any misdescription of area, condition or state of the Property and the Plant and Machinery. (Emphasis added.)

[29] The testing of the machinery and the production lines prior to the execution of the SSPA was further reiterated and catered for in cl 2 of the SSPA.

[30] Clause 2.1 of the SSPA sets out that prior to the execution of the SSPA, the plaintiffs, as the purchasers, had at their own cost and expense conducted and completed the necessary 'test run' on AMP's machinery for the latex gloves production lines at AMP's premises in Jalan Bruas Ayer Tawar.

[31] In cl 2.2 it was further stated that 'The Purchasers had also agreed that the *Purchasers shall be solely liable and responsible to pay for all the costs and expense for the test run of the Company's machinery for the latex gloves production lines* in particular but not limited to the Purchasers' usage of the Palm Kernel Shell (PKS) purchased and owned by the Company'. (Emphasis added.)

[32] Pursuant to the test run, it was stated in cl 2.3 that, 'The Purchasers hereby confirm that *they have satisfied or deemed to have satisfied themselves* with the result of the test run of the latex gloves production lines work and have agreed to enter this transaction'. (Emphasis added.)

[33] Therefore, the basis, context and responsibility for the test run and the inspection of AMP's production lines were expressly agreed upon by the parties and made clear in the SSPA.

[34] In addition, cl 20 of the SSPA provided as follows: A

> 20. WHOLE AGREEMENT
>
> 20.1 No representation or warranties expressed or implied statutory *or otherwise* made by or on behalf of either party to the other in connection with or arising out of the acquisition of the Sale Shares and *which are not contained in this Agreement or the schedules annexed* hereto shall give rise to any liability on the part of the maker thereof, and in particular subject to all the foregoing clauses the *Purchasers hereby acknowledge that they are not entering into the Agreement in reliance upon any representations or warranties*. (Emphasis added.) B

C

[35] As for the financial position of AMP, its audited accounts as at 30 June 2016 and its unaudited accounts as at 30 June 2017 and 30 June 2018 were disclosed in Schedule 2 to the SSPA. The unaudited accounts with its latest figures showed that AMP had current liabilities far in excess of its current assets and for the year ended June 2018, it was making losses in the millions. D

[36] In the recitals to the SSPA, other problems AMP had were also disclosed. It was disclosed, and fully acknowledged by the plaintiffs, that AMP had yet to obtain approvals for planning permission from the Majlis Perbandaran Manjung for the buildings on its lands and AMP had yet to obtain issuance of certificate of completion and compliance of the buildings under the applicable legislation and by-laws. It was stated in recital I that, '… nevertheless the Purchasers agree to proceed and acquire the Vendors' shares'. E

F

[37] It was also disclosed that AMP had been served with notices to cease operation issued by the Majlis Perbandaran Manjung, on the ground that AMP had erected buildings as factories on its lands without any planning permission.

[38] A list of AMP's 'Estimated Creditors as at 31 August 2018' was set out in Schedule 3 to the SSPA and in Schedule 10 was a list of 'Current litigation and non-litigation matters' against AMP as at 17 January 2019. G

[39] In this list of Estimated Creditors of AMP was a creditor by the name of May Chemical (M) Sdn Bhd ('May Chemical') with a claim for a sum of RM169,137.06. May Chemical was later to feature prominently in this case. H

[40] In the list of 'Current litigation and non-litigation matters' what was disclosed was a list of nine creditors in respect of which legal letters of demands from their lawyers had been received by AMP. I

[41] May Chemical was also listed among these nine creditors as having issued a letter of demand from its lawyers, Messrs Cheong Meng & Van Buerle, dated 15 November 2018 for a sum of RM174,152.54.

[42] Also disclosed in the list of 'Current litigation and non-litigation matters' was a winding up notice issued by a supplier by the name of Classic Palm Oil Mill Sdn Bhd dated 6 December 2018 in respect of a sum of RM287,883.54.

[43] Schedule 10 to the SSPA also listed out a supplier who had obtained judgment against AMP, five pending actions brought by suppliers against AMP and seven suppliers who had demanded for payment. The amounts demanded were also set out and disclosed.

[44] The amounts of AMP's debts owed to its creditors disclosed varied from RM9,844.81 to hundreds of thousands with the largest being RM3,487,737.52 in respect of which it was indicated that the supplier had issued a letter of demand for payment.

[45] Also attached as Schedule 9 to the SSPA was a list of six 'PRIORITY/EMERGENCY DEBTS' in respect of which it was provided in that schedule as follows:

> It is agreed by the Purchasers that within THIRTY (30) DAYS from the date of execution hereof the Purchasers shall first deal with the creditors in the list hereto and regularise the Company's priority/emergency debts in the said list.

[46] No doubt in light of all the disclosures and pending claims, cl 5 to the SSPA was headed 'PRIORITY/EMERGENCY DEBTS AND CURRENT LITIGATION AND NON-LITIGATION MATTERS' and cl 5.1 provided as follows:

> 5.1 Both the parties hereto hereby also agree that the *sale and purchase of the Sale Shares is strictly on an 'as is where is' basis where in the Purchasers shall take over, assume, settle and discharge all the obligations, creditors and liabilities (including tax liability) of the Company* as per the List of Estimated Creditors as at 31st August 2018 annexed hereto as Schedule 3. (Emphasis added.)

[47] In addition, under cl 12 of the SSPA, headed 'FINANCIAL POSITION OF THE COMPANY', were:

(a) cl 12.1, which stated as follows:

> Both the Vendors and the Purchasers hereto hereby expressly declare acknowledge and agree that the *sale and purchase of the Sale Shares herein shall be strictly on an 'as is where is' basis wherein the Company is being sold to the Purchasers in its current financial condition based on the liabilities of the Company* as set out in Schedule 3 and the current litigation and non-litigation matters against the Company as at 17th January 2019 as set out in Schedule 10 annexed and the *Purchasers hereby expressly agree and undertake to forthwith take over, assume, settle and discharge all the obligations, creditors and liabilities*

(including tax liability) of the Company as set out in the Schedule 3 hereto and all current litigation and non-litigation matters against the Company and hereafter.

(b) and cl 12.4, which stated as follows:

It is agreed by the Purchasers that the Purchasers have entered into this transaction *strictly on an 'as is where is' basis* wherein the Company is being sold in its current financial condition and the Purchasers hereby agree and confirm that they *have examined or deemed to have examined all the relevant and necessary records of the Company and have conducted or deemed to have conducted the requisite due diligence on all the relevant documents and accounts of the Company* prior to the execution hereof and have satisfied themselves or deemed to have satisfied themselves with the current financial position of the Company and no further examination or review or due diligence is required by the Purchasers after the execution of this Agreement. (Emphasis added.)

[48] That then was the extent of the disclosures and a repetitive statement that the transaction was on an 'as is where is' basis with full knowledge of AMP's financial woes and other problems. Clearly, great care was taken to ensure that the plaintiffs knew and accepted the financial state of AMP and the problems it had.

[49] What was also obviously an important aspect of the SSPA were the plaintiffs' payment obligations under the SSPA. This was later to become a source of dispute in this case.

[50] Clause 3 of the SSPA provided for the plaintiffs' payment obligations in respect of the total consideration. In view of its importance to this case cl 3 is set out below, verbatim.

3.2 Total Purchase Price shall be paid in the following manner:

(a)(i) the Purchasers agree to pay a sum of *Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only* by way of cashier's order to the Vendors or to such other person(s) if so authorised and directed by the Vendors in writing.

Prior to the execution hereof, the said sum of Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only referred to in Clause 3.2(a)(ii) has been deposited by the Purchasers with the Vendor's Solicitors as a stakeholder wherein the sum of Ringgit Malaysia Sixty Thousand (RM60,000.00) only is the earnest deposit and the balance of Ringgit Malaysia Two Hundred And Forty Thousand (RM240,000.00) only is as security payment for the Purchasers' usage of the Palm Kernel Shell (PKS) purchased and owned by the Company for conducting the said test run on the latex gloves production lines at the Company's Premises. The Vendor's Solicitors are hereby authorised by both the parties hereto to release the said Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only to the Vendors or to such other person(s) if so authorised and directed by the Vendors in writing, immediately upon the signing of this Agreement.

(a)(ii) immediately upon the signing of this Agreement, the Purchasers shall pay a further sum of *Ringgit Malaysia Seven Hundred And Fifty Thousand (RM750,000.00) only* by way of depositing a post dated cheque with the Vendors' Solicitors as stakeholder but only to deposit the cheque with a bank for clearance upon expiry of THIRTY (30) DAYS from the date of execution hereof and upon clearance thereof to forthwith release to the Vendors.

(a)(iii) The Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only and the Ringgit Malaysia Seven Hundred and Fifty Thousand (RM750,000.00) only referred to in Clause 3.2(a)(i) and Clause 3.2(a)(ii) above, totalling *Ringgit Malaysia One Million And Fifty Thousand (RM1,050,000.00) only* will collectively form the deposit and go towards account of and as part of the payment of the Total Purchase Price and shall hereinafter referred to as *'the Deposit'*.

(b) the Purchasers shall pay to the Vendor's Solicitors as stakeholder the balance of the Total Purchase Price of *Ringgit Malaysia Two Million Seven Hundred Thousand (RM2,700,000.00) only* (hereinafter referred to as the *'Balance Purchase Price'*) within *THREE (3) MONTHS* from the date of this Agreement (hereinafter referred to as 'Due Date').

(c) in the event the Purchasers shall be unable to pay the Balance Purchase Price within the Due Date, then upon receipt by the Vendors of a written request from the Purchasers the Vendors shall grant a further period of *TWO (2) MONTHS* from the date of expiry of the initial THREE (3) MONTHS to the Purchasers to enable them to to pay the Balance Purchase Price, and in consideration of such extension the Purchasers shall pay to the Vendors interest at the rate of *Ten Percent (10%) per annum* calculated on daily rest (based on 365 days) on the sum of *Ringgit Malaysia Two Million Seven Hundred Thousand (RM2,700,000.00) only* from the date of expiry of the initial THREE (3) MONTHS until the date of receipt by the Vendor's Solicitors as stakeholder the sum of *Ringgit Malaysia Two Million Seven Hundred Thousand (RM2,700,000.00) only* (hereinafter referred to as *'Extended Due Date'*).

[51] Under the SSPA, the first two payments ie the RM300,000 and the RM750,000, were collectively to be regarded as the 'deposit'. This distinguishes the first two payments from the third payment which was defined as the 'balance purchase price'.

[52] In relation to the shares in AMP contracted to be sold, the defendants were to deliver to their solicitors as stakeholder, inter alia, the share certificates and transfer forms duly executed within 30 days from the signing of the SSPA. This was provided under cl 8 headed 'DELIVERY OF DOCUMENTS'.

[53] However, under cl 11 of the SSPA, it is only after the plaintiffs have paid the full purchase price for the AMP shares purchased that the defendants' solicitors, as stakeholder, would be required to *attend to* the transfer of the shares purchased. The relevant part of cl 11.1 stated as follows:

11.1 *Only after the Purchasers shall have duly paid the Total Purchase Price of Ringgit Malaysia Three Million Seven Hundred and Fifty Thousand (RM3,750,000.00)* only

to the Vendor or the Vendor's Solicitors as stakeholder and subject to the Purchasers complying with the conditions in Clause 6.1(a) to Clause 6.1(e) herein, *the parties shall attend to the transfer of the Sale Shares* at the office of the Company Secretary and the Vendors shall then do the following: ... (Emphasis added.)

[54] Clause 11.2 then provided for *effecting* the actual transfer of the AMP shares purchased as follows:

11.2 Subject to the above *the Purchasers shall* within FOURTEEN (14) DAYS from the date of receipt of the Share Certificates and the Share Transfer forms, *effect or cause to effect the transfer of the Sale Shares* and lodge the necessary documents and returns with the Companies Commission of Malaysia in regards to all the changes effected upon completion of this Agreement and to confirm in writing to the Vendors' Solicitors: ... (Emphasis added.)

[55] It was not in dispute that the first payment of RM300,000, *prior* to the execution of the SSPA, was made by the plaintiffs. This payment was made under cover of a letter dated 17 December 2018 from a company by the name of Alpha Teamwork (M) Sdn Bhd.

[56] This letter was signed by Ricky Chong and copied to one Mr Francis Ho Chia Yao. Enclosed were three cheques. In what capacity Ricky Chong signed this letter was not apparent. One cheque dated 26 November 2018 for a sum of RM60,000 was made out from the bank account of one Sew Mee Ling. The other two cheques were drawn on the bank account of one Kong Pok Seng, one for RM120,000 dated 13 December 2018 and the other also for RM120,000 dated 17 December 2018.

[57] From these payments made on behalf of the plaintiffs, it would appear consistent with the second plaintiff's testimony that there were other individuals funding the plaintiffs. The second plaintiff under cross-examination testified that he was made aware by Ricky Chong that one Mr Kong Pok Seng was among the investors funding the purchase of the AMP shares.

[58] The second plaintiff also claimed that both he and the first plaintiff had paid Ricky Chong RM500,000 each although, save for his say so, there was no other evidence given to corroborate this. According to the second plaintiff, the payments were all arranged by Ricky Chong. The first plaintiff did not testify.

[59] The plaintiffs however, failed to make the second payment of a sum RM750,000 in accordance with cl 3.2(a)(ii) of the SSPA.

[60] What happened was that the parties entered into negotiations for an extension of time for this second payment to be made.

[61] In the meantime, on 25 February 2019, and in accordance with the provisions set out in condition 2 of Schedule 7 to the SSPA, the plaintiffs were appointed onto the board of directors of AMP.

[62] The board of directors of AMP thereafter consisted of seven directors; five existing directors and the plaintiffs.

EXTENSION OF TIME AND A SUPPLEMENTAL AGREEMENT

[63] Representing the plaintiffs in the negotiations for an extension of time was Ricky Chong. The upshot of the negotiations was to be a written supplemental agreement to be entered into between the parties.

[64] The second plaintiff testified that on 15 March 2019, he and the first plaintiff were handed four copies of a supplemental agreement ('SA') by Francis Ho who was a broker for the defendants. This set of the SA had not been signed by the defendants.

[65] In cl 1 of this SA, it was stated that the plaintiffs acknowledged having failed to comply with the payment provision set out in cl 3.2(a)(ii) of the SSPA and hence an extension of time was sought to make payment of the RM750,000.

[66] Clause 2 of the SA provided as follows:

> 2. Without prejudice to the right of the Vendors to invoke Clause 17.1 of the Shares SPA and in consideration of the Purchasers' representation and undertaking that they are still ready, willing and able to perform and complete their part of the contract thereunder the Shares SPA, the Vendors hereby agree to grant an extension of time at the request of the Purchasers for them to pay the balance of the Deposit in the sum of *Ringgit Malaysia Seven Hundred and Fifty Thousand (RM750,000.00)* as referred to in Clause 3.2(a)(ii) of the Shares SPA on 15th March 2019 and 15th April 2019 respectively subject to the terms and conditions hereinafter appearing:
>
> (a) simultaneously with the execution of this Supplement Agreement, the Purchasers shall first pay the sum of *Ringgit Malaysia Three Hundred Seventy Five Thousand (RM375,000.00)* only by way of depositing a posted dated cheque with the Vendors' Solicitors as stakeholder but only to deposit the cheque with a bank for clearance on *15th March 2019* and immediately upon clearance thereof to forthwith release to the Vendors and in consideration of such extension of time, the Purchasers shall also pay to the Vendors interest at the rate of *Ten Percent (10%) per annum* calculated on daily rest (based on 365 days) on the sum of *Ringgit Malaysia Three Hundred Seventy Five Thousand (RM375,00.00)* only from *26 January 2019 till 15th March 2019* (both dates inclusive) shall be payable by the Purchasers to the Vendors on 15th March 2019; and

(b) simultaneously with the execution of this Supplement Agreement, the Purchasers shall pay the remaining balance in the sum of *Ringgit Malaysia Three Hundred Seventy Five Thousand (RM375,000.00)* only by way of depositing a posted dated cheque with the Vendors' solicitors as stakeholder but only to deposit the cheque with a bank for clearance on *15th April 2019* and immediately upon clearance thereof to forthwith release to the Vendors and in consideration of such extension of time, the Purchasers shall also pay to the Vendors interest at the rate of *Ten Percent (10%) per annum* calculated on daily rest (based on 365 days) on the remaining sum of *Ringgit Malaysia Three Hundred Seventy Five Thousand (RM375,000.00)* only from *26 January 2019 till 15th April 2019* (both dates inclusive). The interest for the period from 26 January 2019 till 15th April 2019 (both dates inclusive) shall be payable by the Purchasers to the Vendors on 15th April 2019.

(c) in the event the Purchasers fail, neglect or refuse to pay the Vendors the aforesaid sum of Ringgit Malaysia Three Hundred Seventy Five Thousand (RM375,000.00) only on 15th March 2019 together with interest or the post-dated cheque is not cleared by bank for payment on 15th March 2019 and/or the Purchasers fail to pay the Vendors the aforesaid remaining sum of Ringgit Malaysia Three Hundred Seventy Five Thousand (RM375,000.00) only on 15th April 2019 together with interest or the post-dated cheque is not cleared by bank for payment on 15th April 2019 respectively and/or any breach by the Purchasers of any of the terms contained herein and/or contained in the Shares SPA, such breach or failure on the part of the Purchasers shall automatically be deemed as a breach of contract on the Purchasers' part without the need for the Vendors to give 14 days' written notice to the Purchasers to remedy the breach and the Vendors shall be entitled to terminate the Shares SPA and to forfeit the entire sum of Ringgit Malaysia three Hundred Thousand (RM300,000.00) already paid by the Purchasers to the Vendors and to recover from the Purchasers the remaining balance of the Deposit of Ringgit Malaysia Seventy Five Thousand (RM75,000.00).

[67] Payment of the balance purchase price of RM2.7m under the SSPA was not part of the SA. It was expressly stated in cl 9 of the SA that the due date for payment of the balance of the total purchase price of RM2.7m, under the SSPA, remained unchanged.

[68] According to the second plaintiff, having only received copies of the SA for signing on the 15th of March 2019, the first plaintiff and him:

(a) deleted '15th' from the date '15th March 2019' set out in cl 2(a) and the preceding paragraph before and initialed the deletion;

(b) deleted '15th' from the date '15h April 2019' in cl 2(b) and initialed the deletion; and

(c) deleted '15th' from the date '15th March 2019' and amended the date '15th April 2019' to '29th April 2019' in cl 2(c) and initialed the deletion and amendment.

[69] By consent and tendered into evidence as a Part B document were what was alleged to be the two pages, pp 3–4, of the SA with what appeared to be the plaintiffs' initials on the deletions and amendments made. As Part B documents, the existence of these two pages were admitted but their contents were not.

[70] At the bottom of these two pages tendered into evidence were alleged to be the plaintiffs' initials. There were no other initials on these two pages. Why only were these two pages of the copy of the SA signed by the plaintiffs tendered into evidence, and not a copy of the whole SA, was not made known.

[71] It should be noted that the '15th' before the words 'March 2019' allegedly deleted were not substituted with any other date. They were merely deleted.

[72] Having so amended the SA as alleged, the plaintiffs signed the copies of the SA and handed them to Francis Ho, the broker.

[73] The second plaintiff testified that he subsequently received a stamped supplemental agreement ('SSA') with the signatures of the defendants and the plaintiffs on 9 April 2019. The SSA was dated 25 March 2019.

TERMINATION

[74] On the 28 March 2019, the defendants' solicitors Messrs Kean Chye & Sivalingam wrote, and posted by 'AR Registered/Certificate of Posting', to the plaintiffs informing them that the SA had been stamped and the plaintiffs were to collect the SSA at the solicitors' offices in Ipoh.

[75] Significantly, the following paragraphs were set out in this letter of 28 March 2019.

> 3. We are instructed by our client that the first payment of RM375,000.00 out of the RM750,000.00 together with interest as *stipulated in Clause 2(a) of the Supplemental Agreement which was due for payment on 15/03/2019 was not paid to our client on 15/3/2019*. Consequently, you have breached Clause 2(a) of the Supplemental Agreement.
>
> 4. We are further instructed that the second payment of RM375,000.00 out of the RM750,000.00 together with interest *as stipulated in Clause 2(b) of the Supplemental Agreement shall be due for payment on 15/04/2016*.

5. We are further instructed to notify you, which we hereby do, that *you are to pay and settle the first payment of RM375,000.00 out of the RM750,000.00 together with interest as stipulated in Clause 2(a) of the Supplemental Agreement within 14 days from the date of this notice*.

6. Take further notice that in any event and without prejudice to our client's rights and remedies as contained in the Shares Sale and Purchase Agreement dated 26/01/2019 and the Supplemental Agreement dated 25/03/2019, you shall pay to our client the entire sum of RM750,000.00 in full together with interest as stipulated in Clause 2(a) and 2(b) of the Supplemental Agreement *not later than 5.00 pm 15/04/2019 (Monday)*. (Emphasis added.)

[76] This letter was also copied to the company Alpha Teamwork (M) Sdn Bhd and put to the attention of Ricky Chong and Francis Ho.

[77] On 8 April 2019, the defendants' solicitors again wrote to the plaintiffs. This letter, which was sent to the plaintiffs by courier and certificate of posting, referred to both the SSPA and the SSA and stated, inter alia, as follows:

2. Pursuant to the provision set out in clause 3.2(a)(ii) of the Shares SPA, the Purchasers had agreed with the Vendors that the cheque via Affin Bank Berhad Cheque No. 579081 dated 23 January 2019 (issued by ALPHA TEAMWORK (M) S/B on behalf on the Purchasers) for the further sum of Ringgit Malaysia Seven Hundred and Fifty Thousand (RM750,000.00) only which was to be deposited for bank clearance on 26 February 2019 but the Purchasers had on 22 February 2019 insisted the Vendors to postpone the cheque deposition for bank clearance because of insufficient of fund.

3. As a result thereof, you as the Purchasers have failed to pay the further sum of Ringgit Malaysia Seven Hundred Fifty Thousand (RM750,000.00) only which was due for payment on 26th February 2019.

4. The Vendors have the right to invoke Clause 17.1 of the Shares SPA but the Purchasers have requested the Vendors to give them an extension of time to enable the Purchasers to fulfill their agreement to pay the aforesaid sum of Ringgit Malaysia Seven Hundred Fifty Thousand (RM750,000.00) only and to call for a creditors' meeting with RHB Bank Berhad, Eurofin Asia Limited and other non-bank creditors. After signing the Supplemental Agreement both of you have agreed and acknowledged that you have failed to comply with the provision set out in Clause 3.2(a)(ii) of the Shares SPA and sought an extension of time from the Vendors to enable the Purchasers to pay and settle the sum of Ringgit Malaysia Seven Hundred Fifty Thousand (RM750,000.00) only Without Prejudice to Clause 3.2(b) and 3.2(c) of the Shares SPA.

5. *Since all parties have signed the Supplemental Agreement, the Vendors insist that you as the Purchasers should follow and comply with the terms of the Supplemental Agreement. According to Clause 2(b) therein, the Purchasers have until 15th April 2019 to pay the total sum of Ringgit Malaysia Seven Hundred Fifty Thousand (RM750,000.00) only to the Vendors*.

6. *Take Notice that in the event you failed to pay the sum of Ringgit Malaysia Seven*

> *Hundred Fifty Thousand (RM750,000.00) to the Vendors on or before 15 April 2019 the Vendors will be entitled to treat your failure to pay on time as a breach of contract on your part and the Vendors shall be entitled to terminate the Shares SPA* and to forfeit the entire sum of Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only already paid by yourselves to the Vendors and the Vendors are also entitled to recover from you the remaining balance of the deposit sum of Ringgit Malaysia Seventy Five Thousand (RM75,000.00) only without further notice to you as you have agree to in the Supplemental Agreement. (Emphasis added.)

[78] This letter of 8 April 2019 was again copied to Alpha Teamwork (M) Sdn Bhd and put to the attention of Ricky Chong and Francis Ho.

[79] No payment was received from the plaintiffs.

[80] On 9 April 2019, the plaintiffs received the SSA from the defendants' solicitors. This was an agreed fact.

[81] By a letter dated 16 April 2019, the defendants' solicitors gave notice to the plaintiffs of the defendants' termination of the SSPA and SSA. This written notice was sent to the plaintiffs by courier and certificate of posting. In this letter, which made reference to both the SSPA and the SSA, it was stated, inter alia, as follows:

> 2. We are instructed by our clients to refer to the abovesaid Agreements wherein pursuant to the above Agreements, the further sum of RM750,000.00 was *due for payment on 15 April 2019.*
>
> 3. Our clients instructed us that you have failed to pay the said sum of RM750,000.00 *on 15 April 2019* and consequently you have breached the abovesaid Agreements.
>
> 4. TAKE NOTICE THAT pursuant to our clients instructions, we hereby *give you notice that the abovesaid Agreements are hereby terminated*. (Emphasis added.)

[82] It was only after the defendants' solicitors' letter of 16 April 2019, that the plaintiffs' solicitors wrote to the defendants' solicitors. The plaintiffs' solicitors' letter was dated 19 April 2019. Oddly enough, this letter of 19 April 2019 was expressed to be in reply to the defendants' solicitors' letter to the plaintiffs of 8 April 2019. It could be that the defendants' solicitors' letter of 16 April 2019 had not been received.

[83] In their solicitors' letter of 19 April 2019, the plaintiffs maintained that the termination of the SSPA was 'invalid, wrongful and fraudulent'. It denied all the consequences and assertions by the defendants in their solicitors' letter of 8 April 2019. More significantly, of the payment dates under the SSA, the plaintiff's solicitors stated as follows:

7. Your clients shall take notice that the dateline (sic) for the payment of the RM750,000.00 was actually on *29/04/2019 and not 15/04/2019!* This was agreed upon orally and was also embedded in the supplementary agreement dated 25/03/2019. *The original Supplementary Agreement of which four (4) copies were given to our clients to sign had the date as 29/04/2019 (being the dateline (sic) for the payment of RM750,000.00). However, it transpired that when our clients received the stamped copy on 8/04/2019 (the same date as the relevant letter), the date 29/04/2019 was deleted and the date of 15/04/2019 was inserted. You are to check pages 3 & 4 of the Supplementary Agreement where the date 15/04/2019 appears. These two (2) pages were replaced for the original. You will note that our clients have initialed all the pages of the Supplementary Agreement (originally) but when our clients received the stamped copy pages 3 & 4 were replaced. There are no initials of our clients in pages 3 & 4.* This therefore follows that there was no agreement in respect of 15/04/2019.

8. This date 15/04/2019 being fraudulent. Therefore, there is no dateline (sic) for the payment of the RM750,000.00 which means that there cannot be a default!

9. Our clients say that this could not have been unintentionally done by our clients. *This was fraudulently done by your clients!* (Emphasis added.)

[84] This prompted a personal letter in reply dated 27 April 2019 by the third defendant denying the allegations made by the plaintiffs' solicitors in their letter of 19 April 2019.

[85] In his letter, the third defendant denied that there was any agreement to the plaintiffs paying the RM750,000 on 29 April 2019. The third defendant essentially maintained that the extended dates for payment agreed upon were those set out in the SSA.

WINDING UP OF AMP BY MAY CHEMICAL

[86] Following the controversy which arose regarding the termination of the SSPA the parties discovered that a winding up order had in fact been made against AMP on 13 March 2019 pursuant to a winding up petition presented by May Chemical.

[87] This winding up petition was presented on 11 January 2019, and was said to have been served on AMP by solicitors for May Chemical on 15 January 2019.

[88] In evidence, as a Part B document, was a letter dated 15 January 2019 sent by the legal firm of Messrs Cheong Wai Meng & Van Buerle to AMP. On the face of this letter was an indication that it was delivered 'BY HAND'. Enclosed with this letter was stated to be May Chemical's winding up petition dated 11 January 2019 by way of service on AMP. The address on this letter was that of AMP's registered office as stated in the SSPA. Therefore, this letter bore a date *before* the SSPA.

[89] Thus, the winding up petition was presented and served *before* the SSPA dated 26 January 2019. The winding up order was made *after* the SSPA but *before* the SSA.

[90] Both the plaintiffs and the defendants claimed they had no knowledge of the presentation of May Chemical's winding up petition or the winding up order, before it was made.

[91] However, it was the plaintiffs' case that the defendants knew and had fraudulently withheld or failed to disclose information about May Chemical's winding up petition against AMP.

[92] The plaintiffs further contended that they had also discovered, subsequent to the SSPA, that some of the machinery allegedly owned by AMP actually belonged to a company by the name of WRP Asia Pacific Sdn Bhd in which the third defendant has a majority interest.

DID THE DEFENDANTS' FRAUDULENTLY WITHHOLD INFORMATION OF THE WINDING UP PETITION?

[93] There was no direct evidence led by the plaintiffs that any of the defendants were personally aware of May Chemical's presentation of its winding up petition against AMP.

[94] It was submitted by learned counsel for the plaintiffs that based on the third defendant's testimony under cross-examination, the fact that the third defendant knew of the winding up petition could be inferred. The following was the testimony of the third defendant, under cross-examination, that was relied upon:

> AGK: Did you and/or the defendants defend the Winding-up Petition?
>
> DWS4: I don't know. Because all these were dealt by my lawyers.

[95] The third defendant's testimony, however, did not stop there but continued as follows:

> AGK: So I put to you, you and Defendants having known there is Winding-up Petition against the company, deliberately and in bad faith did not defend the Winding-up Petition nor informed the Plaintiff of the same.
>
> DWS4: Disagree.

[96] Further on in the notes of proceedings, returning to the issue in the cross-examination:

AGK: Ask this fist (sic) and the put the question so it will be more complete, My Lord. Therefore, I put to you, that you and the Defendants in bad faith did not disclose that there is a Winding-up Petition against the company by May Chemicals Sdn Bhd dated 12 December 2018 (sic) to the Plaintiffs before you sold the shares to the Plaintiffs.

DWS4: Disagree.

[97] In my view, the statement 'I don't know. Because all these were dealt by my lawyers' does not per se logically, or reasonably, lead to a conclusion that the third defendant or any of the other defendants knew of May Chemical's presentation or service of its winding up petition, or the winding up order before it was made.

[98] From the contents of the SSPA, it did not seem as if it would have been likely that the defendants would have withheld information about May Chemical's winding up petition if they had known about it.

[99] AMP's financial problems, even problems with the authorities were all candidly disclosed. A list of AMP's creditors was set out in Schedule 3 to the SSPA described as 'List of the Company's Estimated Creditors as at 31st August 2018'. As mentioned, May Chemical's claim as a creditor was disclosed in this list.

[100] Also as stated earlier, Schedule 10 to the SSPA disclosed a judgment entered against AMP by MIB Industrial Supplies, five court cases in progress brought by suppliers, a winding up notice issued by a supplier by the name of Classic Palm Oil Mill Sdn Bhd, nine letters of demand from lawyers of suppliers and seven letters of demand from suppliers themselves.

[101] It was as if the defendants were straining every nerve to disclose, 'warts and all' as it were, both financial and other problems of AMP to ensure that the plaintiffs knew of them and had bought the shares in AMP with full knowledge of all of AMP's problems and was willing to accept AMP, 'as is where is'.

[102] All these disclosures, to my mind, were not consistent with the suggested inference that May Chemical's winding up petition was known to the defendants but they chose not to disclose it.

[103] Having made all those disclosures including pending actions, judgment entered and a winding notice served, there was no reason why the defendants would not have added to this list May Chemical's statutory notice or winding up petition had they known of it — particularly since May Chemical's debt of RM174,152.54 was no larger than the amount in the winding up notice issued

by Classic Palm Oil Mill Sdn Bhd which was in respect of a claim of RM287,883.54 or the claim for RM1,067,745.40 demanded by the lawyers for Tenaga Nasional Sdn Bhd.

[104] In addition, both the plaintiffs were appointed to the board of directors of AMP on 25 February 2019. May Chemical's winding up petition was issued and served in January 2019. If the board was informed, the plaintiffs too would have known of this petition.

[105] Even before the SSPA, AMP had already ceased to be active and had ceased its operations. There was no evidence of any administrative or management activity conducted by AMP or undertaken by any of the defendants in respect of AMP. May Chemical's winding up petition could have been served on AMP but was not attended to by anyone at its main office.

[106] However, it was led in evidence that Ricky Chong himself was in negotiations with one Dato' Seri Danny Chew who is a director and the majority shareholder of May Chemical.

[107] According to the testimony of Dato' Seri Danny Chew (DWS3) he met with Ricky Chong sometime in March 2019. He testified that he informed Ricky Chong of the winding up order made against AMP. It was Ricky Chong who initiated this meeting. Ricky Chong informed him that he was taking over AMP. To this, Dato' Seri Danny Chew replied that it was good and asked for payment of May Chemical's debt. However, after that one meeting, Dato' Seri Danny Chew said he heard no more from Ricky Chong. The debt was not paid.

[108] Ricky Chong on the other hand testified that he did meet with Dato' Seri Danny Chew but he was not informed that May Chemical had issued a letter of demand on AMP or had issued any winding up petition. According to Ricky Chong, the meeting was to discuss May Chemical's continued supply of chemicals to AMP and the plaintiffs' proposal to settle May Chemical's outstanding debt.

[109] Under cross-examination, Ricky Chong's testimony of this meeting with Dato' Seri Danny Chew was as follows:

> LHK: OK. Fair enough. Then, let's concentrate on May Chemical.
>
> PWS3: I have seen the Dato' Seri
>
> ...
>
> PWS3: In Kota Damansara
>
> LHK Dato' Seri Danny?
>
> PWS3: Danny, ya.

...

LHK: What happened? What was discussed during the meeting?

PWS3: I went there to present my schedule of payment. That's about it.

LHK: You have a written schedule payment?

PWS3: Yes. In a form — paper form. I given to him.

LHK: Yes.

PWS3: I gave to him

LHK: And he rejected?

PWS3: No, he did not. He actually agreed on what we doing what. Because 169 — RM169,000 one bullet payment I can pay him already. Because our production, as you start our production, when we first buy our material is to fill up the tanks, all the chemical for him to fill up the tanks. It's more than RM169,000.

...

LHK: Now when you say May Chemical, Dato' Seri Danny of May Chemical agreed to your proposal, is there anything in writing?

PWS3: No, because they everyday will go back for talk to their lawyer. I believe there's a demand from —

LHK: From — there's a demand from May Chemical PWS3 Yes.

PWS3: Yes.

LHK: Correct? At that time, May Chemical wanted to wind-up AMP.

PWS3: No. [Inaudible 3:55:11PM] wind-up. Because a lot of people will first give a lawyer letter first, that's normal.

...

J: What happened after that?

PWS3: Nothing happened. He didn't come and see us.

J: Just left like that?

PWS3: Ya. Left it as it is

LHK: So you did not pursue further —

PWS3: So there are a list of so many supplier, I cannot wait for one only.

...

LHK: No, you know it is Plaintiffs' obligations under the Agreement to take over all the debt and settle it. You agree?

PWS3: Yes.

LHK: Yes

PWS3: But we not to pay cash.

...

LHK: For those unsettled debt, you run the risk either being sued, you means the company, or being wind-up by the creditors. Do you agree?

PWS3: Not necessarily. Because we being Chinese we don't do that

...

LHK: There's a risk —

J: Of being sued or being wound-up?

PWS3 There's a risk, yes

LHK: Yes. And you did not take that risk seriously

PWS3: I'm being very, what do you call, personal. Actually go and see them. Each and every one of them.

...

PWS3: Personally I go and see them. After six month, they have left with nothing. After — then I personally go and see them. Is that sincere enough?

...

PWS3: Sue, yes. But normally people don't wind-up

J: Normally, but there's a risk, isn't it?

PWS3: There's a risk.

...

LHK: When you found out the Winding-up Petition — Winding-up Order on 13 March —

PWS3: No, I found out after they terminate our Agreement. We went to sue Dato' then only we found out the AMP have been wound-up.

[110] Clearly the testimonies of Dato' Seri Danny Chew and Ricky Chong were at variance on some issues.

[111] One thing remains clear; May Chemical's debt was disclosed. The plaintiffs knew of it and Ricky Chong knew of it. Ricky Chong met with Dato' Seri Danny Chew and although there were two versions of what took place, the fact remained that there was no payment of May Chemical's debt.

[112] In fact Appendix E to the SSA, was also a list entitled 'List of Priority Creditors'. Having an appendix with such a list was similar to what was also attached to the SSPA in Schedule 9. The list in Schedule 9 to the SSPA was entitled 'PRIORITY/EMERGENCY DEBTS'.

[113] In Schedule 9 to the SSPA, there were six creditors listed thereunder. In Appendix E to the SSA, there were now 18 creditors listed. Among the 18 creditors listed was May Chemical with an outstanding amount owed stated as RM169,137.06. There were other creditors in this list with far larger amounts owed to them. Among them were Tenaga Nasional Bhd for RM1,242,614.23, Hoong Chan Trading & Transport Sdn Bhd for RM776,801.41, Shin Foong

Specialty and Applied Materials Co Ltd for RM2,467,211.16 and KSG Engineering Sdn Bhd for RM2,274,863.16.

[114] In so far as the defendants are concerned, I do not find that there was any evidence that they knew of the presentation of the winding up petition against AMP before the SSPA, or of the subsequent winding up order, until after the winding up order was made.

[115] The inference that was urged upon the court by learned counsel for the plaintiffs was not such that could safely or logically be made having regard to the circumstances of the case and the evidence before the court.

[116] I therefore find, on a balance of probabilities, that the allegation that the defendants had fraudulently withheld informing the plaintiffs of May Chemical's winding up petition or the winding up order, was not proven.

WHETHER THE SSPA WAS ILLEGAL OR FRUSTRATED AND WHETHER THERE WAS TOTAL FAILURE OF CONSIDERATION

[117] By reason of the presentation of the winding up petition against AMP by May Chemical before the SSPA and the subsequent winding up order made after the SSPA, it was the plaintiffs' contention that the SSPA was either illegal or became frustrated.

[118] The foundation for this contention was s 472 of the Companies Act 2016. That section provides as follows:

> 472 Avoidance of dispositions of property or certain attachment, etc
>
> (1) Any disposition of the property of the company, other than an exempt disposition, *including* any transfer of shares or alteration in the status of the members of the company made after the presentation of the winding up petition shall, unless the Court otherwise orders, be void.
>
> (2) In subsection (1), 'exempt disposition' means a disposition made by a liquidator, or by an interim liquidator of the company in the exercise of the power conferred on him under Part 1 of Twelfth Schedule or the rules that appointed him or an order of the Court.
>
> (3) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the presentation of the winding up petition shall be void. (Emphasis added.)

[119] It was also contended that by virtue of s 472, the AMP shares was rendered 'valueless' at the time the SSPA was signed. This was because by the time the SSPA was executed, May Chemical's winding up petition had already been presented.

[120] It is common ground that based on the terms of the SSPA, the AMP shares to be sold thereunder had not been transferred to the plaintiffs. In that sense, there was thus no issue of any transfer of shares being rendered void for want of a court order. The question would therefore be whether the contemplated transfer of AMP's shares under the SSPA was rendered illegal or prohibited by law.

[121] In this regard, I am firstly of the view that caught within s 427 is the transfer of shares in a company against which a winding up petition has been presented. That is to say, within the ambit of s 427 is not only the transfer of the property or assets of such a company but also a transfer of its shares.

[122] In an incisive analysis, His Lordship S Nantha Balan JC (as His Lordship then was) in *Theow Say Kow @ Teoh Kiang Seng, Henry & Anor v Teoh Kiang Hong & Ors and another suit* [2014] 9 MLJ 32 concluded and held that not only the disposition of assets of a company against which a winding up petition has been presented is rendered void in the absence of an order of the court to the contrary, but also any transfer of the shares in such a company. This was, however, in relation to s 223 of the former Companies Act 1965. In so holding, His Lordship declined to follow a view to the contrary expressed in *Nadaraja s/l Muthu & Ors v Palanisamy a/l Ramasamy* [2003] 2 MLJ 523 and the High Court cases following thereon.

[123] There are however differences between s 223 of the Companies Act 1965 and s 472 of the Companies Act 2016.

[124] Section 223 of the Companies Act 1965 provided thus:

> 223 Avoidance of disposition of property, etc
>
> Any disposition of the property of the company including things in action *and any transfer of shares* or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void. (Emphasis added.)

[125] In *Nadaraja*'s case His Lordship Vincent Ng J had held of s 223:

> Thus, I would hold that the words 'disposition of property of the company' ought logically be read conjunctively with the phrase 'and any transfer of shares or alteration in the status of member of the company' in s 223. It would follow that transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s 223.

[126] I am, with respect, in agreement with His Lordship S Nantha Balan's view in *Theow Say Kow* in so far as s 223 is concerned and I also hold the same view in respect of s 472 ie the transfer of the shares in a company against which

a winding up petition has been presented is void unless otherwise ordered by a court.

[127] In my view, s 472 has made things somewhat clearer. As currently formulated with the word 'including', conflating 'any transfer of shares' with 'property of the company' as was done in *Nadaraja*'s case is rendered more tenuous.

[128] In addition, the view in *Theow Say Kow @ Teoh Kiang Seng* referred to above has the benefit of endorsement by the Court of Appeal in *NZ New Image Sdn Bhd v Loh Yok Liang* [2016] MLJU 1768; [2016] 9 CLJ 474 at p 484, where His Lordship Idrus Harun JCA (as His Lordship then was) observed:

> [16] On the other hand, the High Court, in *Theow Say Kow* departed from the decision in *Nadaranja* as the learned judge there was of the view that the decision reached in *Nadaranja* was erroneous or per incuriam. We observed that the High Court in *Nadaranja* had not been apprised of the relevant statutory provisions and case law from the other jurisdictions as had been done in *Theow Say Kow*. The view expressed by the learned judge in *Theow Say Kow* that the words 'and any transfer of shares and alteration of members' must be read disjunctively instead of conjunctively with the other words appearing in s 223 is, in our judgment, correct.

[129] While the transfer of the shares in a company in respect of which a winding up petition has been presented is rendered void unless ordered otherwise by a court, I am, secondly, of the view that s 472 does not affect the validity of any contract to do so.

[130] Section 472 itself contemplates the possibility of such a transfer, if sanctioned by the court.

[131] It seems to me that from its plain words, s 427 does not prohibit the transfer of shares in a company in respect of which a winding up petition has been presented, without more. What it does is to render any transfer of the shares in such a company void *unless* ordered otherwise by a court, which is a very different proposition from an outright prohibition *against* the transfer of its shares.

[132] A person with sufficiently strong finances may choose to purchase the shares of a company with valuable assets albeit shares in a company that is being wound up or has been wound up. Such a purchase could well be sanctioned by the court if it is just and fair and beneficial to the creditors.

[133] In dealing with s 223, the Court of Appeal also referred to the Australian case of *Jordanlane Pty Ltd v Kitching* [2008] VSC 426 which was earlier referred to in the decision in *Theow Say Kow.*

[134] In *Jordanlane Pty Ltd* the Supreme Court of Victoria considered, inter alia, s 468 of the Corporations Act 2001. Section 468(1) of the Australian Corporations Act 2001 stated as follows:

> Any disposition of property of the company, other than an exempt disposition, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.

[135] This provision is materially similar in wording, though not identical, to ss 223 and 472(1) of our Companies Act 1965 and 2016, respectively, in so far as the transfer of shares is concerned.

[136] The argument raised by the defence in *Jordanlane Pty Ltd* was neatly summed up in the judgment of the Supreme Court of Victoria delivered by Beach J. Beach J stated as follows:

> [13] *In his defence, Mr Landeryou contended that, because IQC was in liquidation at the time the Deed of Settlement was executed, the purported sale of shares to Ms Kitching was void. Upon this contention he then asserted defences as follows. First, the consideration provided by Jordanlane to Ms Kitching was said to be worthless*. Secondly, because the purported sale was void, the Deed of Settlement was entered into by Jordanlane in contravention of ss 51AA, 51AB and/or 51AC of the Trade Practices Act 1974 (Cth) or ss 12CA, 12CB and/or 12CC of the Australian Securities and Investment Commission Act 2001 (Cth) and was 'a harsh and unconscionable bargain in equity' and 'liable to be set aside'. Thirdly, he contended that the consideration expressed for the guarantee given by him was the transfer of shares in IQC and as that consideration was void, he was, at the time he signed the Deed of Guarantee, acting under a mistake in believing that the Deed of Settlement was valid. He then contended that, at the time he signed the Deed of Guarantee, Jordanlane knew or ought to have known that the Deed of Settlement was not valid and that he was acting under a mistaken belief and therefore that Jordanlane acted unconscionably in entering into the Deed of Guarantee. All of these contentions are based upon the interpretation of s 468 for which he contends. (Emphasis added.)

[137] The arguments raised bear some resemblance to some of the plaintiffs' contentions raised in the current case.

[138] Bean J dealt with these contentions in the following manner:

> [14] The short answer to the propositions in Mr Landeryou's defence and written submissions is that the construction of s 468 contended for by him is wrong. *Whilst any transfer of shares made after the commencement of a winding up is void unless appropriately sanctioned so far as regards any effect to be given to it by the company, a contract to transfer shares is not rendered void by the section as between the parties themselves.* This is because the purpose of s 468(1) in relation to the transfer of shares is to prevent a shareholder from evading liability as a contributory by transferring shares to some impecunious person after a winding up has commenced and this

purpose is sufficiently served by avoiding the transfer only so far as the company is concerned. It follows that the defences raised by Mr Landeryou in his pleadings are no answer to Jordanlane's claim against him. In any event, I note for the sake of completeness that there is no evidence that Jordanlane knew or ought to have known that the Deed of Settlement was not valid and there is no evidence that Mr Landeryou had any belief (mistaken or otherwise) as to the force and effect of it. (Emphasis added.)

[139] I am equally of that view. A contract for the sale and transfer of shares in a company falling within the ambit of s 472 of the Companies Act 2016, is not rendered illegal or void by virtue of s 472.

[140] Accordingly, I hold that neither the SSPA nor the SSA, if it was validly entered into between the parties, was rendered illegal or void by reason of s 472.

[141] In addition, the contention by the plaintiffs that the AMP shares were rendered valueless by reason of the operation of s 472 was also not maintainable. The value of AMP's shares was not affected by s 472 save that in order to have them transferred, the court's sanction must first be obtained.

[142] This leads to the plaintiffs' contention that the SSPA, and SSA if valid, were frustrated.

[143] This contention was premised on the application of s 57 of the Contracts Act 1950 and the consequences of a contract that has become void provided under s 66 of the Contracts Act 1950 and s 15 of the Civil Law Act 1956.

[144] Section 57 of the Contracts Act 1950 states as follows:

57 (1) An agreement to do *an act impossible* in itself is void.

(2) A contract to do an act which, after the contract is made, *becomes impossible*, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

(3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise. (Emphasis added.)

[145] In *Goh Yew Chew & Anor v Soh Kian Tee* [1970] 1 MLJ 138, Ali FJ stated that:

The doctrine of frustration is relevant only when there is a change of circumstances after the formation of the contract which renders it *physically or commercially*

A *impossible to fulfil* and it does not concern itself as in this case with the initial impossibility which renders a contract void ab initio. (Emphasis added.)

B **[146]** Section 472 of the Companies Act 2016 does not, however, render the transfer of shares in a company caught within that section impossible. It does impose an impediment in that the leave of court is required, and leave may be refused. However, that per se does not render the transfer of shares *impossible*.

C **[147]** In this instance, under cl 11.2 of the SSPA, it was the plaintiffs' obligation to effect transfer of the AMP shares in question. It would therefore be incumbent on the plaintiffs to make the necessary application for the court's approval for the transfer. The issue of legal impossibility may of course arise had such an application been refused. However, until such an application is made and refused, it cannot be said that performance of the SSPA had become D impossible.

[148] It was also maintained by the defendants that the plaintiffs' asserted impossibility was self-induced, relying on the decision of the Court of Appeal in *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 E MLJ 699.

[149] This, the defendants maintained, was because the plaintiffs had failed to deal with, and have resolved, the debt owed to May Chemical by AMP.

F

[150] That had the plaintiffs settled May Chemical's debt, May Chemical would not have proceeded to present its winding up petition against AMP does not necessarily mean that by failing to do so, it was the plaintiffs who had *caused* May Chemical to present its winding up petition — although there may have G been a foreseeable risk of such happening.

[151] In addition, it was not established that the plaintiffs were aware of May Chemical's presentation of its winding up petition against AMP or the winding up order before the winding up order was made. Based on the testimony of H both Ricky Chong and Dato' Seri Danny Chew, it would seem that Ricky Chong only knew of the winding up petition after his March 2019 meeting with Dato' Seri Danny Chew. As for the second plaintiff, he testified that he only came to know of the winding up petition after the SSPA was terminated.

I **[152]** The plaintiffs had also failed to settle the debts of other creditors of AMP, yet no petition to wind up was presented by them. I am not of the view that in the circumstances of this case, May Chemical's winding up petition was caused by the plaintiffs, even though they could have avoided it had May Chemical's debt been settled by them.

[153] In the circumstances, I hold that the SSPA, and the SSA if validly entered, was not frustrated by s 472 of the Companies Act 2016 as it was still possible to transfer the AMP shares purchased by seeking leave of court.

[154] In light of the foregoing I also hold that for the foregoing reasons, the plaintiffs' contention that there was a total failure of consideration was also not made out. This contention was predicated on the SSPA becoming frustrated or rendered illegal by s 472 of the Companies Act 2016 due to the winding up order made against AMP thereby rendering the AMP shares purchased valueless. As I have held that the SSPA was not rendered illegal or became frustrated by reason of the winding up order, it follows that the plaintiffs' contention based on illegality and/or frustration, was no longer tenable.

WAS THERE A VALID AGREEMENT TO EXTEND TIME?

[155] The next issue that needs to be considered was whether there was any valid agreement to extend time for payment under the SSPA.

[156] The second plaintiff in his witness statement maintained that when he and the first plaintiff received the SSA on 9 April 2019, they were surprised to find that the dates on the SA which they had amended and signed, were not reflected in the SSA.

[157] This expression of surprise seems to me to be incongruous with the plaintiffs' lack of response and subsequent delay in responding to the defendants' solicitors' letters.

[158] There was no response from either plaintiffs or Ricky Chong to the defendants' solicitors' letter of 28 March 2019 giving notice of the plaintiffs' breach of cl 2(a) of the SSA in failing to make the first payment of RM375,000 on 15 March 2019, a date allegedly not agreed to by the plaintiffs.

[159] Ricky Chong was copied the defendants' solicitors' letter of 28 March 2019 and he claimed to have witnessed the amendments by the plaintiffs. It seems odd that as the plaintiffs' adviser/consultant, he did not react by correcting the defendants' solicitors' allegations.

[160] Payment obligations being obviously important, one would have expected the plaintiffs, or even Ricky Chong, to have pointed out that the payment said to be due on '15 March 2019' had been amended by the plaintiffs and was not agreed upon.

[161] Until 19 April 2019, there was no response by either plaintiffs or Ricky Chong, to the defendants' solicitors' letter of 8 April 2019 which had set out

material parts of the background regarding payment under the SSPA and had made a specific reference in para 5 to cl 2(b) of the SSA and the date for payment thereunder being '15th April 2019'. This was a date the second plaintiff alleged that the plaintiffs had amended to '29th April 2019'.

[162] Although the plaintiffs only received the SSA on 9 April 2019, if they had in fact amended the dates on the original SA, they could have objected or corrected the dates referred to in the defendants' solicitors' letter of 28 March 2019. They would have known what they had amended and need not have to wait until the SSA was received to point out what they claimed were not dates they had agreed to.

[163] Having received the SSA on 9 April 2019, and being surprised that the dates were not those amended by them, the plaintiffs still did not write to object to the dates appearing in the SSA.

[164] On 16 April 2019, still without any response from either plaintiffs or Ricky Chong, the defendants wrote to terminate the SSPA and the SSA.

[165] It was only on 19 April 2019 that the plaintiffs' solicitors wrote. This letter was expressed to be in reply to the defendants' solicitors' letter of 8 April 2019. No mention was made of the defendants' solicitors' letter of 16 April 2019.

[166] Oddly enough, para 1 of the plaintiffs' solicitors' letter of 19 April 2019, stated as follows:

> 1. Your letter dated 08/04/2019 terminating the Sale and Purchase of Shares Agreement dated the 26/01/2019 is invalid, wrongful and fraudulent.

[167] This was odd because the defendants did not by their solicitors' letter of 8 April 2019, terminate the SSPA. What was stated in that letter of 8 April 2019, in the ultimate paragraph, para 6, was, '... the Vendors will be entitled to treat your failure to pay on time as a breach of contract on your part and the Vendors *shall be entitled to terminate* the Shares SPA and to forfeit the entire sum of Ringgit Malaysia Three Hundred Thousand (RM300,000.00) only already paid by yourselves ...'. (Emphasis added.)

[168] It was in fact the defendants' solicitors' letter of 16 April 2019 that finally gave notice of termination of the SSPA and SSA, not their letter of 8 April 2019.

[169] Furthermore, what was stated in para 7 of the plaintiffs' solicitors' letter of 19 April 2019, was not what the second plaintiff testified the plaintiffs did on pp 3–4 of the SA.

[170] In para 7 of the plaintiffs' solicitors' letter of 19 April 2019, it was alleged that, 'The *original Supplementary Agreement* of which four copies were given to our clients to sign *had the date as 29/04/2019* (being the dateline (sic) *for the payment of RM750,000.00*)'. (Emphasis added.) However, that was not so if the SA, without the plaintiffs' amendments, is examined.

[171] Examining the two pages of the SA allegedly amended by the plaintiffs, it can be seen that what was done was merely the insertion of '29th' after deleting '15th' from the date '15th April 2019'. In addition the second plaintiff did not claim that the plaintiffs had altered the two tranches of RM375,000 payable to one payment of RM750,000.

[172] In para 7 of the plaintiffs' solicitors' letter of 19th April 2019, it was alleged that when the plaintiffs received the SSA, '… the date 29/04/2019 was deleted and the date of 15/04/2019 was inserted'. However, the second plaintiff's testimony was that it was the plaintiffs themselves who had amended the date 15 April 2019 to 29 April 2019 on the SA, and not the other way around.

[173] Indeed, the plaintiffs' amendments on the SA were not actually mentioned at all by their solicitors in their letter of 19 April 2019. What was alleged in this letter appeared to be that it was the defendants, and not the plaintiffs, who had amended the SA in producing the SSA.

[174] It was also pointed out in the plaintiffs' solicitors' letter of 19 April 2019 that pp 3–4 of the SSA did not bear the plaintiffs' initials and that those two pages had been replaced. These pages were alleged to have been fraudulently replaced by the defendants. No mention was however made of the plaintiffs' initials on their alleged amendments to the dates, which appear on the copies of the two amended pages tendered in evidence as well as what was said to be their initials at the foot of those two pages.

[175] As for the absence of the plaintiffs' initials at the bottom of pp 3–4 of the SSA, if the SSA is examined, it will be noticed that not every page of the SSA was initialed by the plaintiffs or, indeed, by the defendants. There was much inconsistency when it came to the initials found on the pages of the SSA.

[176] The SSA had 26 pages including a schedule and several appendixes. Not every page was initialed by every signatory thereto, of which there were six. The pages complained of, ie pp 3–4 had only three initials. Page 5 had six initials

A while p 6 had only five initials. What appeared to be the plaintiffs' initials could be seen on some pages of the appendixes but not on other pages. It was the same with some of the defendants.

B **[177]** There was therefore no consistency in initialing the pages of the SSA such that it could safely be concluded, even on a balance of probability, that the absence of the plaintiffs' initials on pp 3–4 of the SSA meant that those pages had been substituted, let alone substituted by the defendants.

C **[178]** The plaintiffs' solicitor Mr Collin Goonting (PWS2) testified at the trial. In his witness statement, he testified that he was instructed not to reply to the defendants' solicitors' letter of 16 April 2019 but instead to file suit.

D **[179]** Yet oddly enough, he did reply to the defendants' solicitors' letter of 8 April 2019 — purportedly challenging the termination of the SSPA when in fact there was not, as yet, any termination. This was presumably done with the instructions of the plaintiffs. In addition, this reply was dated 19 April 2019 *after* the defendants' solicitors' letter of 16 April 2019, the actual letter which gave notice of termination of both the SSPA and SSA.

E

[180] The defendants' solicitor Ms Chin Pik Khiun testified as DWS1. As far as she was concerned her testimony was that there was no difference between the terms in the original SA and the SSA. She did not notice if the plaintiffs had initialed pp 3–4 of the SA that was returned signed. She merely proceeded to have the SA stamped. There was no evidence that she was aware of any amendments allegedly made on pp 3–4 of the SA by the plaintiffs or whether they had been replaced.

F

G **[181]** The third defendant replied the plaintiffs' solicitors' letter of 19 April 2019 himself. In his letter, the third defendant explained that he was doing so because he personally knew what had transpired and was authorised by the other defendants to do so, on their behalf as well.

H **[182]** In his letter the third defendant fundamentally denied any agreement contrary to what was set out in the SSA and he insisted that the dates for payment therein had been agreed upon. He also denied the plaintiffs' allegations that the defendants had changed the dates on the SSA.

I **[183]** In his closing submissions for the plaintiffs, learned counsel contended that an adverse inference should be drawn against the defendants for not calling Francis Ho, also known as Ho Chia Yao. He had been subpoenaed to testify by the defendants but the defendants subsequently decided not to call him.

[184] The fact that the defendants finally decided not to call Francis Ho, was relied upon for an inference that: A

(a) The Defendants deliberately concealed the fact that AMP has been served with Statutory Notice and Winding-Up Petition;

(b) The Defendants deliberately concealed the fact that the Company has been wound up; B

(c) The Defendants' cheating, including but not limited to the amendments and stamping of the SA; and

(d) The time to pay the balance purchase price is at large. C

[185] Section 114(g) of the Evidence Act 1950 was invoked.

[186] It is often overlooked that s 114(g) is preceded by the words, 'The court may presume the existence of any fact which it thinks *likely to have happened,* regard being had to the common course of natural events, human conduct, and public and private business, *in relation to the facts of the particular case*'. D

[187] In addition, s 114(g) itself states that the court may presume, '(g) that evidence which could be and is not produced would if produced be unfavorable to the person who withholds it'. E

[188] In the first place, I do not think that merely by not calling Francis Ho, the defendants had 'withheld evidence'. He could have been called by the plaintiffs if the plaintiffs thought he might be of assistance to their case. As Edgar Joseph JR FCJ stated in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 at p 519: F

> With respect, it is difficult to see how there could be justification for invoking the presumption under illustration (g) of s 114 of the Evidence Act 1950 against the Intervener/Purchaser for having failed to call the brokers. Illustration (g) says this: 'The court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it'. *There was no evidence that the Intervener/Purchaser had 'withheld' the testimony of the brokers; there had merely been an omission to call them.* G H

[189] In the second place, there were no factual circumstances relied upon by the defendants to suggest that if Francis Ho had testified, he would have testified against the defendants' case. What was relied upon was merely the failure to call Francis Ho. I

[190] Accordingly, I am of the view that there was no justification for the invocation of s 114(g) in the circumstances of this case.

[191] Having regard to the contemporaneous documents and the testimonies of the witnesses, I find the claim that the plaintiffs had amended the dates on pp 3–4 of the SA and the allegation that the pages were fraudulently substituted by the defendants were not proven. Accordingly, the SSPA was not proven to be void or invalid as alleged by the plaintiffs.

WAS THERE A VALID TERMINATION OF THE SSPA?

[192] Based on the SSA, the first RM370,000 was to be paid on 15 March 2019 and the second RM370,000 on 15 April 2019. It was common ground that neither payments were made on those dates specified.

[193] There was therefore clearly a breach of the terms of the SSA.

[194] Under cl 2(c) of the SSA, these non-payments '… shall automatically be deemed as a breach of contract on the Purchasers' part without the need for the Vendors to give 14 days' written notice to the Purchasers to remedy the breach and the Vendors shall be entitled to terminate the Shares SPA and to forfeit the entire sum of Ringgit Malaysia Three Hundred thousand (RM300,000.00) already paid by the Purchasers to the Vendors …'.

[195] Therefore, the termination of the SSPA by the defendants through their solicitors' letter of 16 April 2019 was not in my view, a wrongful termination of the SSPA.

[196] Although I have held otherwise, *even if* the SA was indeed amended by the plaintiffs, they had done so without the consent of the defendants. This necessarily meant that there was no agreement to the dates amended by the plaintiffs. This was necessarily so because both the original SA and the SSA continued to reflect the same dates.

[197] In addition, *even if* the plaintiffs' alleged amendments to the dates in the SA were true, no date was replaced in substitution for the 15 of March 2019 stated in cl 2(a) when the first RM370,000 was to be paid or for the 15 April 2019 provided under cl 2(b) when payment for the second RM370,000 was to be made.

[198] Only the date '29th' April 2019 in cl 2(c) of the SA was allegedly added in substitution for the deletion of '15th' before 'April 2019'. This clause dealt with the failure, neglect or refusal of the plaintiffs to make the payments under cll 2(a) and 2(b).

[199] Thus, the alleged amendments were rather odd. Taken as they appeared on the two pages exhibited, the first RM370,000 would have had to be paid in 'March 2019'. Even so, there was still a breach as no such payment was made in March 2019.

[200] More importantly, *if* the dates in the SA were amended by the plaintiffs as alleged, the amendments were without the defendants' agreement. This can only mean that there was no agreement for any extension of time for payment under the SSPA.

[201] As such the plaintiffs remained in breach for not making the first payment due under the SSPA which, under cl 3.2(a)(ii), was due 'immediately upon the signing of' the SSPA.

[202] Contrary to what I have held, and upon the basis that SSA was not valid, it was submitted that the negotiations for the extension of time rendered time for payment under the SSPA to be at large. For this proposition learned counsel relied on the decision in *Mah Sau Cheong v Tan Eng Chin* [2019] MLJU 1348.

[203] *Mah Sau Cheong*'s case was however concerned with an application for discovery pursuant to O 24 r 7(1) of the Rules of Court 2012. The issue of time being at large was discussed by the learned judicial commissioner in relation to whether the documents sought were relevant to the facts in issue in that case.

[204] However, in *Mah Sau Cheong*'s case, time was not expressly stipulated to be of the essence. This is clear from the learned judicial commissioner's judgment where he stated at p 6:

> To this effect, *even assuming that the time is expressly stipulated and intended to by the parties to be of essence of the contract*, *it* may cease to be of essence when the innocent party waives the breach by express conduct or word or impliedly by continuing negotiations without reservations. (Emphasis added.)

[205] For this proposition the learned judicial commissioner cited the case of the Court of Appeal in *Selaman Sdn Bhd & Anor v Pinang Sari Sdn Bhd* [2017] 4 MLJ 462.

[206] In *Selaman Sdn Bhd,* the relevant proposition is to be found in the judgment of Vernon Ong JCA, in para [29]:

> [29] *We are not persuaded that the learned judge fell into error in arriving at her finding that time has ceased to be of the essence based on the facts and circumstances of the case, including the conduct of the parties.* There is no doubt that pursuant to cl 13 of the SSA *time was originally of the essence of the contract*. Even on 29 January 2014 in granting the third extension that position was maintained. *But that had been waived*

by the conduct of the defendants. The correspondence and the dealings between the parties down to and including 20 February 2014 confirm this view. Time then was no longer of the essence of the contract. *Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract* and it is incumbent upon the first defendant to give a reasonable notice of its intention to abandon the contract if the third payment was not paid (*Webb v Hughes* (1870) LR 10 Eq 281 Ch App 61). (Emphasis added.)

[207] *Selaman Sdn Bhd* was a case in which, upon the facts, it was found that there was a *waiver* of time being of the essence.

[208] In *Mah Sau Cheong* reference was also made to *Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149 FC where Jeffrey Tan FCJ stated:

[14] The long and short of it, as held and observed in *Hock Huat Iron Foundry*, is that *where a party not in default does not rescind a contract under s 56(1) of the Contracts Act 1950 but allows the party in default to complete the work beyond the completion date, then time is no longer of the essence of the contract*, and that when time is at large, the promisor must perform the promise within a reasonable time as provided under s 47 of the Act, and if there is unreasonable delay the party not in default may give a notice fixing a reasonable time for performance after the expiration of which the party not in default would treat the contract as at an end (rephrased from *Law of Contract in Malaysia* by A Mohaimin Ayus at p 20). (Emphasis added.)

[209] In *Sime Hok Sdn Bhd,* the question of law posed and considered by the Federal Court was, 'Where an agreement is silent as to the time for performance of a promise thereunder, whether a breach of the promise occurs, without any notice, after the expiry of a reasonable time pursuant to s 47 of the Contracts Act 1950 (Act)'. The answer given by the Federal Court was in the affirmative.

[210] In the case of *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65; [1999] 1 CLJ 89, which was referred to in *Sime Hok Sdn Bhd*, there was clearly a waiver. In the judgment of NH Chan JCA he stated thus at p 74 (MLJ) of the report:

Since the defendant did not rescind the contract under s 56(1) of the Contracts Act 1950 when the plaintiff failed to complete on 31 January1981 but instead had allowed the completion date to pass and had even allowed the plaintiff to remedy his default by permitting him to continue to work on the project until it was wholly completed, time was no longer to be regarded as of the essence of the contract. And when time is no longer of the essence of the contract, s 56(1) (which is only applicable to cases where the parties to the contract have intended that time is essential) no longer applies.

When time is no longer of the essence of the contract and no time for performance is specified, the promise must be performed within a reasonable time. Section 47 reads ... (Emphasis added.)

[211] In *Hock Huat Iron Foundry*, the party in breach of non-delivery on an agreed date was allowed to remedy the breach, to complete and deliver at a later date. Surely the innocent party cannot thereafter, insist on the earlier completion date being of the essence.

[212] The cases cited where time was subsequently found no longer to be of essence, whether by reason of negotiations that took place or otherwise, were predicated on a finding that there had been a waiver of time being of the essence.

[213] This principle harks back to what was actually stated by Sir R Malins VC in *Webb v Hughes* (1870) LR 10 Eq 281:

> But if time be made the essence of the contract, *that maybe waived by the conduct of the purchaser*, and if the time is once allowed to pass, and the *parties go on negotiating for completion of the purchase*, then time is no longer of the essence of the contract.

[214] The facts of that case should also not be overlooked. As Sir R Malins VC stated in his judgment:

> In my opinion, *the agreement in this case did not make time the essence of the contract*, because the very condition shews that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase; but upon payment of the money, the purchaser was to be entitled to possession of the property. *It was, therefore, evidently contemplated that the time might extend beyond the day fixed for completion*. (Emphasis added.)

[215] Whether there exists a waiver or not is necessarily fact sensitive and dependent on the facts of each case. If a waiver is not expressed, the conduct of the innocent party must at least be shown to be inconsistent with an insistence that time remained of the essence.

[216] In the case at hand, the plaintiffs were in breach of the SSA in failing to make the first payment that was required to be made immediately upon signing of the SSPA. This was not in dispute.

[217] The parties then entered into negotiations for an extension of time by way of a supplemental agreement.

[218] Under cl 27 of the SSPA time *was* made of the essence in the following manner:

> 27. TIME
>
> 27.1 *Time shall always be of the essence* as regards the provisions of this Agreement, *both as regards the times and periods mentioned herein as well as regards any extension*

A *of times or periods* which may, subsequently be by any mutual written Agreement made between the parties hereto be substituted for the initial time frame herein stipulated. (Emphasis added.)

B **[219]** In addition, cl 33 of the SSPA stated as follows:

33. KNOWLEDGE OR ACQUIESCENCE

33.1 *Knowledge or acquiescence by either party hereto of or in any breach of the terms conditions or covenants herein contained shall not operate as or be deemed to be a waiver of such terms conditions or covenants* but notwithstanding such knowledge or acquiescence each party hereto shall still be entitled to exercise his respective rights under this Agreement and to require strict performance of the terms conditions and covenants herein by the other party. (Emphasis added.)

C

D **[220]** Indeed even the SSA continued to contain a provision making time of the essence. Clause 13 of the SSA provided as follows:

13. Time shall always be of the essence as regards the provisions of this Supplemental Agreement.

E **[221]** In the circumstances of this case, to suggest that the negotiations for the SSA had somehow resulted in a waiver of time being of the essence is to ignore the very purpose of the SSA in the first place.

F **[222]** The negotiations to extend time was itself necessarily predicated on a breach ie the failure to pay upon a specified time under the SSPA in respect of which time had been made of the essence of the contract. It was *because* the breach was not to be waived that the parties sought an agreement for an extension of time.

G **[223]** Thus, the extension of time, if agreed upon, would result in a waiver of the plaintiffs' breach and a new time frame put in place for performance of the term breached.

H **[224]** As was stated by Jessel MR in *Barclay v Messenger* (1874) 43 LJ Ch 449 at p 456 cited in *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 at p 71; [1999] 1 CLJ 89 at p 99:

I It appears to me plain that a mere extension of time, and nothing more, is only a waiver *to the extent of substituting the extended time for the original time*, and *not an utter destruction of the essential character of the time*. (Emphasis added.)

[225] Also cited in *Hock Huat Iron Foundry* are the following words of Buckley LJ in *Buckland and others v Farmer & Moody (a firm)* [1978] 3 All ER 929 at p 937:

If a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date the time remains essential.

[226] Having regard to the foregoing, even if contrary to what I have held and the SSA was not valid for the reasons asserted by the plaintiffs, I am of the view that time under the SSPA was not at large or ceased to become of the essence because of the negotiations entered into by the parties for an extension of time. The plaintiff's breach of cl 3.2(a)(ii) of the SSPA was not waived, and time remained of the essence.

[227] In addition, the defendants' right to terminate the SSPA was not merely upon the basis in law that since time was made of the essence, therefore the plaintiffs' failure to pay within the time stipulated afforded the defendants the right to terminate the SSPA.

[228] There was a specific provision under cl 17 of the SSPA which allowed the defendants to elect whether to rescind the SSPA if there was a breach by the plaintiffs. Clause 17 of the SSPA stated as follows:

17. DEFAULT BY PURCHASERS

17.1 *In the event the Purchasers or any of them shall fail to comply with Clause 3.2,* Clause 6.1(a) to Clause 6.1(e) or fail to complete the purchase of the Sale Shares in accordance with the terms and conditions herein and/or shall commit any breach of the terms and conditions and any warranties or undertakings contained herein this Agreement, *then the Vendors shall be entitled by a notice in writing to the Purchasers to elect either to enforce this Agreement* against the Purchasers by way of specific performance and/or claim for damages from the Purchasers *or alternatively to rescind the sale and purchase of the Sale Shares under this Agreement*.

17.2 (a) *In the event the Vendors elect to rescind, then in the event the breach is not rectified within FOURTEEN (14) DAYS from the date of such notice being given to the Purchasers, then the Purchasers agree the Vendors shall be entitled to forfeit Ringgit Malaysia Three Hundred and Seventy Five Thousand (RM375,000.00) only (hereinafter referred to as 'the Forfeited Sum') being a sum equivalent to ten percent (10%) of the Total Purchase Price as agreed liquidated damages* and the Purchasers or their Solicitors, as the case may be, shall forthwith return or cause to return to the Vendors' Solicitors all documents received from the Vendors or the Vendors' Solicitors with the Vendors/Company's interest intact and the Purchasers shall re-transfer the Sale Shares to the Vendors at the cost and expense of the Purchasers (if have already been transferred) and the director(s) nominated by the Purchasers shall immediately resign or be removed from the Board of Directors of the Company in simultaneous exchange for the refund of the Deposit after deducting the Forfeited Sum, free of any interest. (Emphasis added.)

[229] Carefully considered, cl 17.1 of the SSPA does not actually require a 14-day notice to be given for any breach to be remedied *before* termination by reason of that breach may be effected.

[230] However, under cl 17.2, the defendants may only forfeit a sum of RM375,000 as liquidated damages if the breach is not remedied after a 14-day notice to do so has been given. Thus the 14 days to remedy the breach related only to the right to forfeit a sum of RM375,000.

[231] If no such notice is given, the right to forfeit will be affected but not necessarily the right to terminate. Of course if such a notice is given and the breach remedied, the right to terminate would be extinguished.

[232] There was no contention or assertion by the plaintiffs to the effect that this right to terminate expressly agreed to in the SSPA was in any way waived by the defendants.

[233] Notice of the plaintiffs' breach, non-payment under the SSA and the breach of cl 2(a) thereof was given to the plaintiffs by the defendants' solicitors in their letter of 28 March 2019. Further notice of the breach was given on 8 April 2019. It was only on 16 April 2019 that the defendants gave notice of their termination of the SSPA and the SSA.

[234] Therefore, although not required to do so in order to terminate either the SSPA or the SSA, notices demanding payment and thus for the breach to be remedied were nevertheless given.

[235] In view of the foregoing, I hold that the defendants' termination of both the SSPA and the SSA to be valid.

UNJUST ENRICHMENT

[236] The allegation of unjust enrichment was pleaded in the amended statement of claim as an implied term to the SSPA.

[237] Pleaded in paras 25–27 of the amended statement of claim was as follows:

> 25. It was also an implied term in the SSPA that the Defendants cannot be unjustly enriched by the Plaintiffs' investments in the event the SSPA is terminated as the Plaintiffs had invested enormous costs and expenses in putting the production lines in operation but did not own the Company until the completion of the SSPA.
>
> 26. Prior to the completion of the SSPA, the Plaintiffs had only the beneficial interest in the Company. Therefore, whatever costs and expenses incurred by the Plaintiffs at the material time benefitted the Defendants as legal owners of the Company.
>
> 27. The Plaintiffs shall refer to the costs incurred and detailed below in paragraph 107.

[238] Paragraph 107 of the amended statement of claim however, not only sets out what was alleged to be 'special damages' but also 'future loss of profit earnings'. A

[239] The alleged 'special damages' consisted of alleged payment of salary for workers, payments for purchase of parts and material including latex, workmanship, repair and commissioning of the four production lines, various other purchases and the deposit of RM300,000 paid. B

[240] What was undisputed was the fact that payment would have been incurred in respect of the four production lines and payment of the RM300,000 prior to the SSPA referred to therein. C

[241] As for the other payments, there was no evidence that the plaintiffs had themselves made any payment or incurred any loss in respect of salaries or payments to contractors. D

[242] Although Ricky Chong admitted under cross-examination that the production lines were not running, he nevertheless insisted that a total of 150 workers were required to clean and to service the machinery. E

[243] However, the evidence led disclosed that some of the alleged employees were in fact hired by a company known as Apex Hectors Sdn Bhd, not the plaintiffs. F

[244] In addition, there was no evidence that any of the workers allegedly hired by the plaintiffs were actually paid. Under cross-examination Ricky Chong claimed that only half of the workers had been paid though he did not make the payments himself. G

[245] Among the claims of the plaintiffs was a sum of RM101,250 for latex based on an invoice from a company called WDE Distribution (M) Sdn Bhd ('WDE'). WDE's invoice dated 28 February 2019 was however issued to AMP and not to either plaintiff. Furthermore, under cross-examination, Ricky Chong admitted that this sum had in fact not been paid. H

[246] Also included in their claims was an invoice by Telekom Malaysia Bhd for RM164.70 that was issued to Apex Hectares Sdn Bhd, not the plaintiffs. I

[247] In fact, it also turned out that an invoice issued for the repair of the production lines for RM600,000 had also not been paid by the plaintiffs. This was also admitted by Ricky Chong under cross-examination. This sum was reflected in a quotation dated 15th February 2019 issued by one ZAE Global

Resources to AMP, and not to either plaintiff. This quotation was for an amount of RM600,000 payable, 'To provide manpower to repair, change, weld, repaint, replace faulty bearings, rollers, clean and reinstall all ceramic formers and commission test run for 1.2 km of double dipped former dipping line'.

[248] There was also an invoice dated 19 November 2019 by one JQ Drilling Well for RM37,000 for drilling a six inch groundwater tube well system. However, this invoice was again issued to AMP, not to either of the plaintiffs. One Mr Mah Ka Hei (PWS5), a sales and marketing agent for JA Drilling Well, testified at the trial. He testified that in fact no payment had been received for JQ Drilling Well's invoice for RM37,000.

[249] There was then the testimony of one Mr Peter Lim Tet Look (PWS7). He testified claiming to be employed as a general manager with AMP. He dealt with Ricky Chong and had never met the plaintiffs. In his witness statement PWS7 claimed that some of the local and foreign workers had been paid but not the management staff. When cross-examined, he testified as follows:

> AGK: Has the salary due paid to the workers?
>
> PWS7: Local workers, as to date, they have been paid half of it. The foreign workers still not yet.
>
> AGK: Paid by whom, Mr Peter?
>
> PWS7: Arranged by Ricky.

[250] Rather than having suffered any loss, it would appear that the plaintiffs and their consultant, Ricky Chong, had been hiring workers and incurring debts in the name of AMP without bearing any payment. Despite that, what the plaintiffs sought were reimbursement of monies on grounds of unjust enrichment which included debts created but not paid.

[251] There was something somewhat cavalier about the manner in which the plaintiffs have attempted to make their claims for compensation in this case. Having heard the testimonies and seen the witnesses, I am of the view that the main architect of all that transpired in respect of the SSPA, the SSA and also the securing of workers and the incurring of debts in the name of AMP was Ricky Chong.

[252] In fact, from the cross-examination of the second plaintiff, it was quite clear that he did not actually know what was done or carried out by Ricky Chong purportedly on his behalf, or on behalf of the first plaintiff for that matter. The first plaintiff himself did not testify. Everything was left to Ricky Chong.

[253] Factually, I find that there was in fact no benefit conferred on AMP or the defendants or benefit enjoyed by either, at the expense of the plaintiffs. Rather than a benefit, AMP seems to have been saddled with the costs for all these alleged 'benefits'.

[254] As for the expenses and costs incurred in the name of AMP, whether AMP is actually liable remains a question at large but not one that needs to be answered in this action. Suffice it to say, whether these expenses and costs were incurred with the authority of AMP would be an issue that would have to be dealt with.

[255] The expenses and costs incurred in the name of AMP by the plaintiffs through Ricky Chong, or perhaps the expenses and costs Ricky Chong had incurred in the name of AMP, were also contrary to what was provided in the SSPA.

[256] As what may be described as an interim measure, cl 7.2 of the SSPA provided as follows:

> 7.2 The Purchasers hereby also agree and undertake with the Vendors that the *Purchasers shall employ their own staff/workers by using outsource labour under a separate management and account of the Purchasers* and *shall not under the accounts of the Company* before the full release and discharge of the current Guarantee(s)/Security(ies)/Undertaking(s) from the RHB Bank Berhad and Eurofin Asia Limited is obtained and *before the Total Purchase Price is paid by the Purchasers to the Vendors or the Vendor's Solicitors as stakeholder in full*.

[257] Thus, AMP was not to be saddled with bearing the costs for workers or staff hired by the plaintiffs until, inter alia, after full payment of the balance purchase price under the SSPA.

[258] As mentioned, the unjust enrichment invoked and specifically pleaded by the plaintiff in its amended statement of claim was by way of an implied term in the SSPA and not upon the species of unjust enrichment as a cause of action adumbrated by His Lordship Azahar Mohamed FCJ (as His Lordship then was) in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441. In that case Azahar Mohamed FCJ stated:

> [110] ... The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. ... The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.

[259] Of unjust enrichment as an independent cause of action, Azahar Mohamed FCJ made the following observations which are also pertinent to this case:

> [117] ... The principle underlying the cases of *Banque Fianciere de la Cite v Parc (Battersea) Ltd* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:
>
> (a) the plaintiff must have been enriched;
>
> (b) the enrichment must be gained at the defendant's expense;
>
> (c) that the retention of the benefit by the plaintiff was unjust; and
>
> (d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[260] Save for the singular initial payment of RM300,000 which was specifically catered for in the SSPA, I find that the defendants received no other benefit at the expense of the plaintiffs.

[261] The implied term pleaded by the plaintiffs was of the first type referred to by His Lordship Zulkefli PCA in *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal* [2019] 1 MLJ 25 in para [74] namely, '... an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract'.

[262] Of this type of implied term, Zulkefli PCA stated that there are two tests to be applied:

> *The first test is a subjective test*, as stated by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1993] 2 KB 206 at p 227 that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common 'Oh, of course'.
>
> *The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties*. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v Cooper* [1941] AC 108 at p 137. that in regard to an implied term, '... it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. (Emphasis added.)

[263] In the case at hand, the expenses for repairing and conducting the tests on the four production lines in AMP's factory, even if they were actually incurred by the plaintiffs, were incurred *prior* to the SSPA.

[264] In addition, they were expenses expressly stated in the SSPA for which the plaintiffs, '... shall be solely liable and responsible to pay ...'.

[265] The test and repairs were not part of any term or obligation imposed on the plaintiffs in the SSPA. They were for the plaintiffs' own satisfaction and cl 2.3 of the SSPA also states that:

> 2.3 The Purchasers hereby confirm that *they have satisfied or deemed to have satisfied themselves* with the result of the test run of the latex gloves production lines work and have agreed to enter this transaction. (Emphasis added.)

[266] Having regard to the foregoing, I do not see how the two tests applicable for the term sought to be implied by the plaintiffs could be met. The express terms in the SSPA negate the very term the plaintiffs seek to have implied.

[267] In addition, these repairs were to AMP's factory lines. They were not property owned by the defendants. To treat the repairs and restoration of AMP's production lines as a benefit to the defendants would be to ignore the distinction that exists between a company, as a legal person, and its shareholders and directors.

[268] This distinction in law is particularly important given the fact that AMP has numerous creditors and has been wound up. AMP's production lines, if they are worth anything, are assets which would be available towards settling its debts. Thus, in the circumstances of this case, it would not be correct to maintain that the defendants had benefited from the repairs to AMP's factory lines.

[269] In any event, the repairs to AMP's production line based on the ZAE Global Resources quotation to AMP of 15 February 2019, was not even paid.

[270] In the circumstances I find that the plaintiffs' claim for restitution whether based on an implied term as pleaded or even upon unjust enrichment as an independent cause of action, is untenable and not established.

THE DEFENDANTS' COUNTERCLAIM

[271] As regards the defendants' counterclaim, it was a claim for a specific sum of RM3.45m against the plaintiffs respect of their breach of the SSPA and the SSA. There was no claim made for any general damages.

[272] The breaches alleged included the plaintiffs' failure to meet their payment obligations under the SSPA and SSA and their failure to settle the debts and tax liability of AMP.

A **[273]** Fraud was also alleged. The particulars of fraud related to what were essentially misrepresentations by the plaintiffs including misrepresentation that they had the financial means to carry out their obligations under SSPA which included payment for the AMP shares and to settle AMP's creditors.

B **[274]** The specific sum of RM3.45m claimed was in fact the balance of the purchase price in the SSPA.

[275] This loss was predicated on the contention that the plaintiffs had failed
C to settle the debt owed to May Chemical, which was disclosed. This was a breach of cl 5.1 of the SSPA.

[276] It was contended that as a result of this breach, AMP was wound up and the defendants have suffered a sum equivalent to the balance of the total
D purchase price under the SSPA which was claimed to be the value of AMP.

[277] In my view this was not a viable claim. Rather than to seek to specifically enforce the SSPA, the defendants had themselves elected to terminate the SSPA and the SA. In so doing, the defendants had also retained the RM300,000 that
E was paid as part of the deposit, as set out in the SSPA.

[278] It was a term of the SSPA under cl 17.2(a) that in terminating the SSPA for breach, the defendants may forfeit RM375,000 as liquidated damages. It
F seems to me that the defendants had by retaining the RM300,000, in effect, exercised it rights to liquidated damages as agreed, albeit RM75,000 short of the agreed sum.

[279] The defendants' pleaded claim was however in the form of special
G damages rather than general damages; the damages claimed being the value of AMP.

[280] In my view, the winding up of AMP was not a loss suffered by the defendants as such. There was no evidence of any sale or loss of AMP's assets.
H Whatever value AMP was, as a company, remained the same, after the SSPA and upon winding up. Whatever creditors it had would also be the same and there was no evidence to the contrary.

I **[281]** Furthermore, the AMP shares to be sold had not been transferred to the plaintiffs and the defendants continue to remain as shareholders of AMP.

[282] Accordingly, I do not see that the defendants' claim for what was effectively the balance of the purchase price under the SSPA was made out.

[283] As for the declaration sought by the defendants that the termination of the SSPA was lawful, I do not regard that declaration sought to be necessary in the circumstances of this case, as this issue had been determined and ruled upon in respect of the plaintiffs' claim.

IN CONCLUSION

[284] Having regard to the foregoing and for the reasons given, both the plaintiffs' claim and the defendants counterclaim are dismissed.

Plaintiffs' claim and defendants' counterclaim dismissed.

Reported by Dzulqarnain Ab Fatar